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Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
CAROL WEHLE, EXECUTIVE DIRECTOR
UNITED STATES OF AMERICA
U.S. SUGAR CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Clean Water Act ("CWA") unambiguously prohibits the "addition" of any pollutants to "navigable waters" without a National Pollutant Discharge Elimination System ("NPDES") permit. The "unitary waters" theory – discussed and questioned by this Court in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) ("*Miccosukee*") – posits that all of the "navigable waters" of the United States constitute a single body such that the transfer of water from any one body of "navigable waters" to any other could never be an "addition" within the meaning of the statute. The Environmental Protection Agency ("EPA") Regulation at issue in this case adopts the "unitary waters" theory.

The question presented is whether the Eleventh Circuit's decision according deference to the EPA's "unitary waters" theory Regulation is contrary to the CWA's unambiguous language, which, as this Court suggested in *Miccosukee*, prohibits the transfer or discharge of a pollutant from one meaningfully distinct body of water to another without a NPDES permit; and whether the court of appeals' decision violates the separation of powers doctrine by effectively allowing the manipulation of a federal lawsuit by an agency of the Executive Branch.

PARTIES

Petitioner (Intervenor-Plaintiff Below):

The Miccosukee Tribe of Indians of Florida is the petitioner here. The Friends of the Everglades; Florida Wildlife Federation; and Fishermen Against Destruction of the Environment, all of which were plaintiffs below, have also submitted a separate petition for certiorari in this matter.[1]

Respondents (Defendants Below):

The South Florida Water Management District; its Executive Director, Carol Wehle, in her official capacity; the United States Sugar Corporation; and the United States of America are the respondents. The South Florida Water Management District and Ms. Wehle were defendants before the district court. United States Sugar and the federal government were intervenor-defendants below.

CORPORATE DISCLOSURE STATEMENT

The Miccosukee Tribe of Indians of Florida has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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1. The Friends of the Everglades et al. submitted their separate petition to the Court on August 5, 2010. Justice Thomas granted the Miccosukee Tribe of Indians of Florida an extension of time, until August 19, 2010, to submit this petition for certiorari.

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Petitioner Miccosukee Tribe of Indians of Florida respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, which afforded deference to an absurd administrative interpretation of the CWA on the basis of an EPA Regulation that was adopted for the purpose of overruling the district court's decision, and which is contrary to the plain and unambiguous language of the statute and in violation of the separation of powers doctrine.

OPINIONS BELOW

The Eleventh Circuit issued an opinion in this case, as well as an order denying en banc consideration. The opinion and final judgment of the court of appeals is styled, *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009) ("*Friends*"), and is included in Appendix A. The United States District Court for the Southern District of Florida's findings of fact and conclusions of law are found in the decision styled, *Friends of the Everglades, Inc. v. South Florida. Water Management District*, 2006 WL 3635465 (S.D. Fla. Dec. 11, 2006) ("*Friends*"). The district court's orders are in Appendices B, C, and D.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254. The court of appeals entered an opinion and final judgment on June 4, 2009 (App. A). It later denied rehearing en banc by order dated May 7, 2010 (App. E). On August 3, 2010, Justice Thomas extended the time within which to file this petition for writ of certiorari, making it due on August 19, 2010.

STATUTES INVOLVED

This case involves the NPDES permitting provisions of the CWA. The CWA prohibits the discharge of any pollutant without a permit. 33 U.S.C. §§ 1311, 1342. At issue is whether, under 33 U.S.C. § 1362(12), the transfer of a pollutant from one *meaningfully distinct* body of "navigable waters" to another is a "discharge" of a pollutant within the meaning of the CWA, such that a NPDES permit must be obtained. A "discharge" of a pollutant is defined in the CWA as "any addition of any pollutant to navigable waters from any point source." *Id.* The meaning of that language was the subject of the EPA's proposed Rule (71 Fed. Reg. 32889) and final Regulation (73 Fed. Reg. 33697 and 40 CFR 122.3(i)), as well as the focus of both the district court and the court of appeals in resolving the dispute below. The relevant statutory provisions are included in Appendix F, and the EPA's final Regulation is contained in Appendix G.

STATEMENT OF THE CASE

This Petition arises from two consolidated lawsuits filed in 2002 by the Friends of the Everglades, the Fishermen Against Destruction of the Environment, and the Florida Wildlife Federation (collectively, "plaintiffs"). The lawsuits alleged that the South Florida Water Management District ("SFWMD") violated the CWA by allowing discharges of pollutants into Lake Okeechobee (the "Lake") without NPDES permits. Petitioner, the Miccosukee Tribe of Indians of Florida (the "Tribe"), intervened as a plaintiff because the back-pumping of pollutant-laden waters into the Lake without permits threatens the Tribe's environment and way of

life. United States Sugar and the federal government intervened on behalf of the defendants.[2] The district court had jurisdiction under 28 U.S.C. § 1331 and 33 U.S.C. § 1365(a).

The Lake is a large and shallow body of water that remains "the central feature of the Everglades ecosystem and is recognized as its liquid heart." *Friends*, 2006 WL 3635465, at *7 (App. D at 70a). "It is the largest body of fresh water in the southeastern United States and the second largest freshwater lake within the continental United States." *Id.* The Lake is also considered a "navigable water," as that term is used in the CWA. *Id.* Adjacent to the Lake are a series of canals that collect polluted water drained from their respective basins. *Id.* at *12 (App. D at 81a). This canal water contains by-products of industrial, municipal, and construction activities that are conducted within the basins. *Id.* Pump stations (named "S-2," "S-3," and "S-4") are built into the dike around the Lake where it adjoins the canals. *Id.* at *13 (App. D at 84a). Massive quantities of polluted water are then moved through the pumps and discharged into the Lake. *Id.* at *14 (App. D at 86a). The Lake is a potable water source and the district court found that the discharge at issue poses a public health threat. *See id.* at *18-*19 (App. D at 97a); *see also* Order on Remedies (App. C at 45a) (back-pumping creates "significant risk" of "serious injury to humans and death to wildlife"). The issue before the district court was whether permits were required before the SFWMD could back-pump polluted canal water into the Lake.

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2. The SFWMD, United States Sugar, and the United States government, including the EPA, shall at times collectively be referred to as the "defendants."

The consolidated case was stayed pending this Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004) ("*Miccosukee*"). In *Miccosukee*, this Court decided in favor of the Tribe on the issue presented – whether a point source must be the original source of the pollutant. *Id.* at 104-05. The Court answered that question in the negative, concluding that the point source need only convey the pollutant to "navigable waters." *Id.* at 105. The Court found that no NPDES permit is required unless pollutants are transferred from one body of water to another *meaningfully distinct* body of water. *Id.* at 112. *Miccosukee* was remanded because the Court found summary judgment premature, as there remained a question of fact as to whether the bodies of water at issue were meaningfully distinct. *Id.*

In addition, the Court chose not to address the merits of the government's so-called "unitary waters" argument, which "posits that all of the navigable waters of the United States constitute a single water body, such that the transfer of water from any body of water that is part of the navigable waters to any other could never be an 'addition'" within the meaning of the statute.[3] *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 451 F.3d 77, 81 (2d Cir. 2006) ("*Catskill II*"). Although the *Miccosukee* majority and

3. In other words, under the theory "all the water bodies that fall within the Act's definition of 'navigable waters' (that is, all 'the waters of the United States, including the territorial seas,' § 1362(7)) should be viewed unitarily for purposes of NPDES permitting requirements." *Miccosukee*, 541 U.S. at 105-06.

Justice Scalia both favored leaving the "unitary waters" question for another day, the majority ruled that the government could advance the argument on remand. *Miccosukee*, 541 U.S. at 109. Justice Scalia, on the other hand, wrote separately because he believed that there was "no point in directing the Court of Appeals to consider an argument it has already rejected." *Id.* at 113 (Scalia, J., concurring in part and dissenting in part). Importantly, the Court questioned the "unitary waters" theory, noting that several NPDES provisions might be read to conflict with the "unitary waters" approach. *Id.* at 107-08.

After *Miccosukee* was decided and the stay in this case lifted, the district court held a bench trial. Using this Court's decision in *Miccosukee* as its guide, the district court determined that the Lake and the canals were in fact meaningfully distinct. In so concluding, the district court rejected the EPA's "unitary waters" theory and held that "in the absence of a NPDES permit, the operation of the S-2, S-3, and S-4 pump stations to backpump pollutant-containing waters from the canals in a northerly direction into Lake Okeechobee is in violation of the CWA." *Friends*, 2006 WL 3635465, at *61 (App. D at 200a). The district court arrived at this determination on the basis of statutory interpretation, concluding that the plain language of the CWA required the SFWMD to obtain permits for the operation of its pumping structures because they were "point sources" discharging "pollutants" into navigable waters. *Id.* The EPA had earlier moved for summary judgment on the "unitary waters" theory, which, if accepted, would have entitled it to judgment as a matter of law. R. 369. But the court denied that motion. R. 527 at 1. In its order following the trial, the court rejected every argument made by the defendants regarding exclusions and exemptions under the CWA, reasoning that requiring

permits for back-pumping is "consistent with the CWA goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters." *Id.* at *42 (citing 33 U.S.C. § 1251(a)) (App. D. at 133a).

After the close of trial, but before the district court entered judgment, the EPA proposed a Rule that exempted water transfers, such as those at issue here, from the permit requirements of the CWA, and defined water transfer as an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening use. As with the defendants' other arguments, however, the district court ultimately rejected this one too, ruling that "[n]o agency interpretation, or court order for that matter, can alter the unambiguous congressional intent expressed in a statute and the Court thus rejects the interpretation proposed by the EPA." *Friends*, 2006 WL 3635465, at *48 (App. D at 169a).

Subsequent to the district court's decision and while this case was pending on appeal, the EPA issued a new Regulation adopting the "unitary waters" theory and condoning the SFWMD's transfer of pollutants from one body of water to another meaningfully distinct body without a permit.[4] *See* 73 Fed. Reg. 33697-708 (June 13,

4. The final Regulation has been separately challenged in several federal district and circuit courts. The Judicial Panel on Multidistrict Litigation ordered that the circuit court challenges be litigated in the Eleventh Circuit, *see Friends of the Everglades v. E.P.A.*, No. 08-13652-C (11th Cir.), and stayed pending the decision of the court of appeals in this case. The district court lawsuits have also been stayed. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. E.P.A.*, 630 F. Supp. 2d 295 (S.D.N.Y. 2009)).

2008) (codified at 40 C.F.R. § 122.3(i) (hereinafter, the "Regulation") (App. G). Through this *post hoc* interpretation, the EPA ignored key portions of this Court's decision in *Miccosukee* and effectively eviscerated the permit provisions of the CWA, codifying its argument that all "navigable waters" are one.

The Eleventh Circuit agreed that "the agricultural canals and Lake Okeechobee are meaningfully distinct water bodies." *Friends*, 570 F.3d at 1216 n.4 (App. A at 10a). But instead of affirming the district court consistent with *Miccosukee*, the court of appeals reversed on the basis of the EPA's new Regulation. *Id.* at 1228 (App. A at 36a). While recognizing that the "unitary waters" theory had been uniformly rejected by courts, the Eleventh Circuit found the Regulation entitled to deference because, in its view, the statutory language was ambiguous. *Id.* at 1218-19, 1227-28 (App. A at 13a, 34a). The court of appeals declined en banc review after requesting a response on the en banc petitions and considering the case for nearly a year. *Friends of the Everglades v. South Fla. Water Mgmt. Dist.*, 605 F.3d 962 (11th Cir. 2010) (App. E).

The Tribe now seeks a writ of certiorari to review the Eleventh Circuit's decision, which is contrary to the unambiguous language of the CWA and not only conflicts with precedent from this Court and the other circuits on the issue of whether a NPDES permit is required for the discharges here, but also with the constitutional doctrine of separation of powers.

REASONS FOR GRANTING THE PETITION

In *Miccosukee*, this Court, while expressing doubts, left unanswered the question of whether the "unitary waters" theory is an incorrect construction of the CWA's permitting provisions. 541 U.S. at 107-08, 109. Likewise, in a separate opinion, Justice Scalia stressed the importance of "leaving the Government's unitary-waters theory to be considered in another case." *Id.* at 113 (Scalia, J.). This is that case.

Certiorari should be granted because the opinion of the court of appeals conflicts with the decision of this Court in *Miccosukee*, which held that conveyances that do not themselves add pollutants nevertheless require NPDES permits, and with decisions of all other circuits that have considered the "unitary waters" approach. The decision below allows discharges of pollutants into "navigable waters" of the United States without permits, in contravention of the unambiguous language and intent of the statute. The court of appeals' acceptance of the government's theory eviscerates the NPDES permitting requirement of the CWA, which, as the district court recognized, represents "the most important tool in achieving the goal of cleaning up the nation's waters." *Friends*, 2006 WL 3635465, at *42 (App. D at 133a). The court of appeals' decision will undoubtedly affect numerous discharges, allowing the movement of pollutants from contaminated and toxic canals into pristine waters. Thus, in order to settle the meaning of this important federal statute, the Court should grant review in this case.

Relatedly, certiorari is also necessary to resolve the issue of whether an agency's mid-suit promulgation of a regulation is entitled to any deference when it merely sets forth a previously-argued and previously-rejected litigation position. As we have here, an agency's codification of a losing litigation position is suspect and not attendant with the usual indicia of reliability. In deferring to the EPA's Regulation in this case, the court of appeals disregarded this fact as not important. In so doing, it departed from this Court's instruction that administrative interpretations tantamount to amorphous litigation positions carry little, if any, weight and that deference is not due when a statute is clear.

Further, the Court should grant review because the EPA's promulgation of the Regulation, in order to force deference to its previously-rejected litigation position, violates the separation of powers doctrine in two respects: first, because it allows an agency of the Executive Branch to prescribe a rule of decision without amending applicable law; and second, because the judgments of Article III courts are not answerable to, and cannot be altered by, an agency of a coordinate branch of government.

Thus, in addition to important issues regarding the interpretation of the CWA and the plain meaning of the NPDES permitting provisions, this case presents an exceptional question about how far the government may go to shroud an untenable and rejected interpretation of a federal statute with apparent legitimacy, through an eleventh hour Regulation designed to alter the lawsuit's outcome.

I. Certiorari Should Be Granted Because The Eleventh Circuit's Decision, Which Is Contrary To The CWA's Unambiguous Permit Requirements, Is Inconsistent With This Court's Decision In *Miccosukee* Requiring Permits, As Well As With The Decisions Of Other Circuits Regarding The "Unitary Waters" Theory

Certiorari should be granted because the Eleventh Circuit's interpretation of the CWA's NPDES permitting provisions is inconsistent with this Court's decision in *Miccosukee*, which recognized that NPDES permits are required for discharges of pollutants where bodies of water are meaningfully distinct.

Miccosukee found that "a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters.'" *Miccosukee*, 541 U.S. at 105. The EPA's Regulation contradicts this holding by exempting conveyances of "navigable waters" from permitting requirements so long as nothing is added to the water en route to the transferring destination. The EPA explained that, under the final Regulation, permits are required only for "pollutants introduced by the water transfer activity itself to the water being transferred," and that the scope of the required NPDES permits would be only for those "added pollutants." *See* 73 Fed. Reg. 33697, 33705 (June 13, 2008) (responding to public comments). This is another way of saying that a permit is required only if the point source is the original source of the pollutant – a position directly rejected by *Miccosukee*'s holding. In fact, the EPA's explanation shows that its interpretation is directly contrary to *Miccosukee*: "Such a permit would

not require the water transfer facility to address pollutants that may have been in the donor waterbody and are being transferred." *Id.*

The Eleventh Circuit agreed with the district court that the canals and the Lake were meaningfully distinct bodies of water under the CWA. *Friends*, 570 F.3d at 1216 n.4 (App. A at 10a). Consistent with *Miccosukee*, therefore, NPDES permits were required for the back-pumping. *See Catskill II*, 451 F.3d at 82 ("*Miccosukee* held that if the canal and the wetlands are not meaningfully distinct water bodies – an unresolved factual question – no NPDES permit is required."); *Friends*, 2006 WL 3635465, at *37 ("[T]he [*Miccosukee*] Court held that the water transfer activities only required a NPDES permit if they transferred water (and pollutants) from one body of water to another meaningfully distinct body of water.") (App. D at 143a). The Eleventh Circuit's contrary finding, and its deference to the EPA's Regulation, thus creates a conflict with *Miccosukee*. This conflict in the interpretation of an important federal statute, as well as the unprecedented environmental damage that will result as a consequence of the decision below, makes this an issue of exceptional importance meriting certiorari review.

So does the fact that the EPA's interpretation conflicts with precedent from the First and Second Circuits. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 273 F.3d 481 (2d Cir. 2001) ("*Catskill I*"); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of N.Y.*, 451 F.3d 77 (2d Cir. 2006) ("*Catskill II*"); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d

1273 (lst Cir. 1996). In *Dubois*, the First Circuit noted the problem with the interpretation advanced by the EPA in the Regulation here: under the "unitary waters" theory, a river so polluted that "[i]t emitted an overwhelming odor and was known to peel the paint off buildings located on its banks" would be allowed to discharge into a pond irrespective of the river's pollution and no matter how pristine the pond. *Dubois*, 102 F.3d at 1297. The First Circuit concluded that Congress could not have intended such an "irrational result." *Id.* Similarly, in *Catskill II*, the Second Circuit rejected the "unitary waters" theory (and every basis argued in support of it), finding that nothing in the text of the CWA supports inter-basin transfers of pollutants without permits. *See Catskill II*, 451 F.3d at 84-85; *see also Friends*, 2006 WL 3635465, at *48 (App. D at 169a). Like the First Circuit, the Second Circuit concluded that the EPA's interpretation "would lead to the absurd result that the transfer of water from a heavily polluted, even toxic, water body to one that was pristine via a point source would not constitute an 'addition' of pollutants and would not be subject to the CWA's NPDES requirement." *Catskill II*, 451 F.3d at 81 (citing *Catskill I*, 273 F.3d at 493). Yet in this case, remarkably, the Eleventh Circuit concluded that such an interpretation was reasonable.

Thus, by countenancing the EPA's interpretation in the final Regulation, the court of appeals delivered a decision in conflict with the First and Second Circuits, which have described the theory underlying the agency's interpretation as irrational and absurd. Further, the Eleventh Circuit's decision conflicts with *Miccosukee*'s interpretation of the CWA and its

skepticism of the "unitary waters" approach. The district court here, as with other courts before it, rejected the "unitary waters" theory. This Court should now grant certiorari to finally resolve the issue left open by *Miccosukee*, a case that the Tribe took to this Court approximately six years ago in order to protect its homeland, the Everglades, and which remains unresolved in the district court because of the EPA's "unitary waters" theory.

II. Certiorari Should Be Granted Because The Eleventh Circuit Accorded Deference To The EPA's Regulation Contrary To This Court's Decisions

Certiorari also should be granted because, contrary to prior Supreme Court precedent, the court of appeals erroneously accorded deference to the EPA's Regulation under *Chevron U.S.A. Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837 (1984).

A. The EPA's interpretation is not entitled to deference because the CWA is unambiguous

This Court has said that "[i]n the context of an unambiguous statute, we need not contemplate deferring to the agency's interpretation." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) (citing *Chevron*, 467 U.S. at 842-43).[5] No *Chevron* deference

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5. *See also Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 272 (1968) (courts should not affirm administrative decisions which are inconsistent with a statute); *Koshland v. Helvering*, 298 U.S. 441, 446-47 (1936) (a regulation cannot amend a statute's unambiguous provisions).

was owed to the EPA's absurd interpretation because the statute's permitting requirement is unambiguous, just as the district court found. *See Friends*, 2006 WL 3635465, at *48 ("[T]he undersigned finds that the statute is unambiguous. No agency interpretation, or court order for that matter, can alter the unambiguous congressional intent expressed in a statute and the Court thus rejects the interpretation proposed by the EPA.") (App. D at 169a); *see also Catskill II*, 451 F.3d at 84-85 (plain meaning of the word "addition" in the CWA controls).

The court of appeals strained to find ambiguity and treated as outcome determinative a Regulation that works substantive changes to the statute under the guise of "clarification." *See Smith v. Scott*, 223 F.3d 1191, 1195 (10th Cir. 2000) (an agency cannot make substantive changes under guise of clarification). Indeed, "[t]he [EPA's] treatment of this statute is not an interpretation but a rewrite." *Indiana Michigan Power Co. v. Dep't of Energy*, 88 F.3d 1272, 1276 (D.C. Cir. 1996). As the Court explained in *Barnhart*:

> [The Judiciary's] role is to interpret the language of the statute enacted by Congress. This statute does not contain conflicting provisions or ambiguous language. Nor does it require a narrowing construction or application of any other canon or interpretative tool. "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then,

> this first canon is also the last: 'judicial inquiry is complete.'" We will not alter the text in order to satisfy the policy preferences of the Commissioner. These are battles that should be fought among the political branches and [the affected parties]. Those parties should not seek to amend the statute by appeal to the Judicial Branch.

Barnhart, 534 U.S. at 461-62 (citations omitted). That analysis aptly fits this case. If the defendants' "policy preferences" are that no permits be required for transfers between separate bodies of "navigable waters," then they must properly and within the limits of law take that battle to the "political branches," not the courts. The statute as written is unambiguous in its requirement for NPDES permits and thus no deference was owed to the EPA's Regulation.

The Eleventh Circuit's finding of ambiguity evinces a misdirected focus on the term "navigable waters" instead of "addition" in the statute. The issue in this case is whether the back-pumping of dirty canal water into the Lake constitutes a "discharge" of pollutants so as to require NPDES permits. "Discharge" includes "*any addition* of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (emphasis supplied).

Rather than focusing upon the plain meaning of the word "addition," as the Second Circuit did in *Catskill I* and *II* and as the district court did in this case, the Eleventh Circuit shifted its focus to the term "navigable waters." *See Friends*, 570 F.3d at 1223 ("The question

is whether 'addition . . . to navigable waters' – meaning addition to 'the waters of the United States' – refers to waters in the individual sense or as one unitary whole.") (App. A at 25a). It reasoned that the statute was ambiguous because "navigable waters" did not have the word "any" in front of it:

> According to the Water District, the conspicuous absence of "any" before "navigable waters" in § 1362(12) supports the unitary waters theory because it implies that Congress was not talking about *any* navigable water, but about *all* navigable waters as a whole. The Friends of the Everglades' reading effectively asks us to add a fourth "any" to the statute so that it would read: "Any addition of any pollutant to *any* navigable waters from any point source." But we are not allowed to add or subtract words from a statute; we cannot rewrite it. Besides, if the meaning of language is plain, no alteration should be necessary to clarify it. The addition or subtraction of words indicates that the unaltered language is not plain.
>
> * * *
>
> There are two reasonable ways to read the § 1361(12) language "any addition of any pollutant to navigable waters from any point source." One is that it means "any addition . . . to [any] navigable waters;" the other is that it means "any addition . . . to navigable waters [as a whole]." As we have held before,

> "the existence of two reasonable, competing interpretations is the very definition of ambiguity."

Id. at 1224, 1227 (citations omitted; emphasis original) (App. A at 28a, 36a). Notably, the EPA did not rely on the "absent any" argument that the Eleventh Circuit panel found so dispositive, and this curious disconnect between the agency's rationale and the court of appeals' decision clearly undermines the argument for deference.

Moreover, what the court of appeals ignored is the plain meaning of the term "any addition." As the district court and Second Circuit found, that term unambiguously means that permits are required whenever there is something added to a body of "navigable waters," and this Court held in *Miccosukee* that the "addition" must be from another meaningfully distinct body of water. The district court explained as follows:

> "Addition" is defined as the "joining of one thing to another." Webster's Third International Dictionary Unabridged, p. 24 (1993). Although the EPA states "that it is reasonable to interpret 'addition' as not generally including the mere transfer of waters from one water of the U.S. to another," it offers no sound explanation in support of its strained definition of the term. 71 Fed. Reg. 32891. Notwithstanding Defendants' protestations to the contrary, it is evident that "addition . . . to the waters of the United States" contemplates an addition from

> anywhere outside of the receiving water, including from another body of water.

Friends, 2006 WL 3635465, at *42 (citations omitted) (App. D at 133a). Similarly, the Second Circuit found that "[g]iven the ordinary meaning of the CWA's text," the government's "unitary waters" theory offers "an interpretation [that] is inconsistent with the ordinary meaning of the word 'addition.'" *Catskill I*, 273 F.3d at 493; *see also Dubois*, 102 F.3d at 1297-99 (discussing meaning of "addition"). Thus, both of those courts found that "addition" was the relevant term and that a permit is required if pollutants are transferred from one body of water to another meaningfully distinct body. *Miccosukee*, 541 U.S. at 112. In focusing on the term "navigable waters" instead of "any addition," the Eleventh Circuit incorrectly found ambiguity where there is none.

Clearly, "navigable waters" is used in the statute as a jurisdictional term to identify those bodies of water that are subject to federal regulation. *See, e.g., Rapanos v. United States*, 547 U.S. 715 (2006) (discussing jurisdictional significance and scope of "navigable waters"); *Kaiser Aetna v. United States*, 444 U.S. 164, 172 (1979) (discussing "definition of 'navigable waters' as this Court has used that term in delimiting the boundaries of Congress' regulatory authority under the Commerce Clause"). The CWA merely requires that the destination waters (that is, the waters into which a discharge occurs) are "navigable," or "waters of the United States," so as to ensure they are subject to Congress's authority to regulate under the Commerce Clause. The originating location or character of the

waters being discharged into "navigable waters" is simply irrelevant under the statute. As explained, all that matters for purposes of determining whether there is a "discharge" of pollutants such that a permit is required, is whether there has been "any addition" of pollutants from another meaningfully distinct body of water. That the CWA contains a scheme of provisions focusing upon the water quality standards of individual bodies strongly supports this reading of the statute.[6] *See Miccosukee*, 541 U.S. at 106-07. Thus, the term "addition" was not ambiguous; and, consequently, there was no basis for the Eleventh Circuit to defer to the EPA's construction.

Moreover, the prior court decisions finding the statute unambiguous control over the EPA's subsequent interpretation, pursuant to this Court's decision in *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005) ("*Brand X*"). *Brand X* held that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that *its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.*" *Id.* at 982 (emphasis supplied). In other

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6. So too does the fact that the term "dredged spoil" is part of the definition of "pollutant" under 33 U.S.C. § 1362(6). "Dredged spoil" inherently comes from other "navigable waters"; and yet when it is discharged, a permit is required. *See* Petition for Writ of Certiorari by Friends of the Everglades et al. at 22-23. Thus, the EPA's "unitary waters" theory is inconsistent with the very definition of "pollutant" under the CWA.

words, "[o]nly a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction." *Id.* at 982-83.

Because prior decisions left "no gap for the agency to fill," the court of appeals owed no deference to the agency's interpretation here. *Id.* Prior court decisions found that the "unitary waters" theory conflicts with the plain language of the statute. *See Catskill II*, 451 F.3d at 85 (repeatedly indicating that its decision was mandated by "the text of the CWA" and the statute's "plain language"); *Friends*, 2006 WL 3635465, at *48 ("[T]he undersigned finds that the statute is unambiguous. No agency interpretation, or court order for that matter, can alter the unambiguous congressional intent expressed in a statute and the Court thus rejects the interpretation proposed by the EPA.") (App. D at 169a). In *Catskill I* and *II*, for example, the Second Circuit, like the district court in this case, found that the word "addition" plainly meant permits were required whenever there is a transfer of water from one meaningfully distinct body to another. *See Catskill II*, 451 F.3d at 84-85. Thus, consistent with *Brand X*, those prior interpretations of the statute's plain language should trump the EPA's contrary construction in the Regulation.[7]

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7. One ancillary question left after *Brand X* "to bedevil the lower courts," 545 U.S. at 1018 (Scalia, J., dissenting), is readily apparent here and should be resolved by this Court – *i.e.*, the force that prior judicial determinations of no ambiguity *by a sister circuit* carry under *Brand X*'s agency-reversal rule.

B. The EPA's interpretation is not entitled to deference because the theory underlying it has been unanimously rejected by the courts

Deference was also inappropriate because the Regulation is based on a theory that has been uniformly rejected by every court to have considered its merits. As the Eleventh Circuit itself recognized, even this Court has cast doubt on the "unitary waters" theory, albeit without definitively deciding the issue:

> The unitary waters theory has a low batting average. In fact, it has struck out in every court of appeals where it has come up to the plate. Even the Supreme Court has called a strike or two on the theory, [but] . . . [t]he Court has not, however, called the theory out yet.

Friends, 570 F.3d at 1217-18 (citing, among others, *Catskill I*, 273 F.3d at 491; *Catskill II*, 451 F.3d at 83; *Dubois*, 102 F.3d at 1296; *Miccosukee*, 541 U.S. at 107) (App. A at 12a).[8]

In *Miccosukee*, this Court referred to the "unitary waters" theory with skepticism and noted its tension with other statutory provisions and regulations:

> [S]everal NPDES provisions might be read to suggest a view contrary to the unitary

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8. The Eleventh Circuit also acknowledged that a prior panel of that court had at "one time decided to reject" the "unitary waters" theory as well, "but that decision was vacated" when this Court granted certiorari in *Miccosukee*. *See Friends*, 570 F.3d at 1218 (App. A at 13a).

> waters approach. . . . This approach [under 33 U.S.C. §§ 1313(c)(2)(A) and (d)] suggests that the Act protects individual water bodies as well as the "waters of the United States" as a whole.
>
> The Government also suggests that we adopt the "unitary waters" approach out of deference to a longstanding EPA view that the process of "transporting, impounding, and releasing navigable waters" cannot constitute an "'addition'" of pollutants to "'the waters of the United States.'" But the Government does not identify any administrative documents in which EPA has espoused that position. Indeed, an *amicus* brief filed by several former EPA officials argues that the agency once reached the opposite conclusion. The "unitary waters" approach could also conflict with current NPDES regulations [including, for example 40 C.F.R. § 122.45(g)(4)]. . . . *The NPDES program thus appears to address the movement of pollutants among water bodies*, at least at times.

541 U.S. at 107-08 (citations omitted; emphasis supplied).

As the *Miccosukee* decision suggests, the "unitary waters" theory in fact presents a problematic interpretation that is incompatible with several provisions of the CWA – including, notably, the entire group of provisions aimed at water-body-specific "water quality standards." *Miccosukee*, 541 U.S. at 106-07; *see also Catskill II*, 451 F.3d at 81. Nevertheless,

contrary to all circuits that have decided the issue, the Eleventh Circuit panel concluded that the CWA was ambiguous with regard to the requirements for NPDES permits and then afforded deference to the final Regulation that codified this absurd theory.

This Court recently said that "[w]e need 'accept only those agency interpretations that are reasonable in light of the principles of construction courts normally employ.'" *See Morrison v. Nat'l Australia Bank Ltd.*, 130 S.Ct. 2869, 2887, (2010). In *Morrison*, the Court rejected the SEC's interpretation because it relied on the flawed reasoning of "cases we disapprove" and therefore "we owe [the agency's position] no deference." *Id.* at 2887-88. The same holds true in this case. The court of appeals acknowledged that the "unitary waters" theory, upon which the Regulation is based, was rejected by every circuit to have considered it and was questioned by this Court in *Miccosukee*. Indeed, the opinion below concludes that "all of the existing precedent and the statements in our own vacated decision are against the unitary waters theory," adding that, "[i]f nothing had changed, we might make it unanimous." *Friends*, 570 F.3d at 1218 (App. A at 13a). Those prior decisions rejecting the "unitary waters" theory as untenable were rendered on the basis of "the principles of construction that courts normally employ." Accordingly, consistent with *Morrison*, the Regulation should be rejected as a baseless construction of the CWA that is entitled to no deference.

In sum, because the Eleventh Circuit has embraced a construction that is both obviously inconsistent with the CWA and contrary to decisions of other circuits, the

Court should now decide the issue it left open in *Miccosukee* and definitively rule out the "unitary waters" theory. *See, e.g., N.L.R.B. v. United Food & Comm. Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 123 (1987) (deference owed only "as long as [agency's] interpretation is rational and consistent with the statute"); *Ma v. Ashcroft*, 361 F.3d 553, 559 (9th Cir. 2004) (where agency's interpretation "contravenes the statute and leads to absurd and wholly unacceptable results," the court "need not defer"); *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1069 (D.C. Cir. 1998) (no *Chevron* deference where "the [agency] has embarked upon an adventurous transplant operation" of the statute and its interpretation "is inconsistent with the unambiguously expressed intent of Congress").

C. The EPA's interpretation is not entitled to deference because it is merely a losing litigation position that was subsequently codified in the course of this case

In addition to the reasons above, the EPA's Regulation is due no deference because, as this Court has said, agency interpretations amounting to little more than "convenient litigating position[s]" carry little weight. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (level of deference owed to agency interpretations advanced during litigation is "near indifference"). Similarly, the Court has said that an agency's "*post hoc* rationalization[s]," which are advanced "to defend past

agency action against attack," are not subject to deference. *See, e.g.*, *Auer v. Robbins*, 519 U.S. 452, 462 (1997); *Bowen*, 488 U.S. at 212; *cf. FedEx Corp. v. Holowecki*, 552 U.S. 389, 400 (2008) (according deference because there was "no reason to assume the agency's position . . . was framed for the specific purpose of aiding a party in this litigation"). Consistent with these principles, an agency "may not take advantage of [its] power to promulgate retroactive regulations during the course of a litigation for the purpose of providing [it]self with a defense." *Chock Full O' Nuts Corp. v. United States*, 453 F.2d 300, 303 (2d Cir. 1971). Yet, in this case, the EPA did just that; and the court of appeals condoned it.

After briefing on appeal, the EPA finalized the Regulation at issue here. It did so to tip the scales in its favor and alter the outcome of this federal lawsuit – something that it succeeded in doing. In merely making "official" its prior arguments, the EPA did not change the character of what was still a mere convenient litigating position – one which the district court rejected out of hand. Indeed, the Regulation itself actually quotes from the government's appellate brief to the Eleventh Circuit, thus making plain that the EPA was simply attempting to legitimize what was previously just an unpersuasive argument. *See* Petition for Writ of Certiorari by Friends of the Everglades et al. at 8. The EPA's Regulation was a game-changer in this lawsuit, and the very essence of a forbidden *post hoc* rationalization. Were it not for the EPA's Regulation, the court of appeals would not have reached the conclusion that it did.

In finding insignificant the EPA's manipulation, the Eleventh Circuit mistakenly relied upon statements from this Court's decisions in *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996); *United States v. Morton*, 467 U.S. 822, 835 n.21 (1984); and *Barnhart v. Walton*, 535 U.S. 212, 221 (2002). Those cases are inapposite under these facts. In *Smiley*, the Court did say that it does not "matter that the regulation was prompted by litigation, including this very suit." *Smiley*, 517 U.S. at 741. But the agency position there was not advanced as a losing argument in the lower court only to be later codified as a regulation in order to alter the outcome on appeal. Thus, *Smiley* does not control here;[9] and neither does *Morton* or *Barnhart*.

In *Morton*, there is no indication that the position embodied in the regulation was advanced as a losing litigation position only to be subsequently adopted in order to turn the tides in the case. In addition, the Court found the regulation's enactment in response to the lawsuit unproblematic because the suit had "brought to light an additional administrative problem of the type that Congress thought should be addressed by regulation," which was before not otherwise apparent. *Morton*, 467 U.S. at 836 n.21. The same cannot be said here. The EPA was well aware of the central

9. Importantly, however, *Smiley* noted the principle explained above, that "[o]f course we deny deference 'to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice,'" because "[t]he deliberateness of such positions, if not indeed their authoritativeness, is suspect." *Smiley*, 517 U.S. at 741 (citing *Bowen*, 488 U.S. at 212). To the extent *Smiley* is relevant at all, it is for that proposition, not the one relied upon by the court of appeals.

interpretative issue in this case, as the "unitary waters" theory was nothing new and had been advanced as argument – unavailingly – in several prior cases. This fact makes the EPA's manipulation readily apparent.

Barnhart is similarly unhelpful because there, unlike here, the regulations were not adopted to effectively manipulate the case's outcome. Indeed, the agency's position carried the day before the district court and was only defeated before the Fourth Circuit, which found that the statute was unambiguous and, hence, not subject to the agency's interpretation. *Barnhart*, 535 U.S. at 216. Upon review, this Court disagreed, stating that "the statute does not unambiguously forbid the [agency's] regulation." *Id.* at 218. It then went on to find the agency's construction permissible. *Id.* at 219-20. Accordingly, when the Court refused to disregard the regulations because they were "only recently enacted . . . , perhaps in response to this litigation," *id.* at 221, it did so under circumstances completely inapposite to this case.

The court of appeals was therefore wrong to take the uncritical view that the EPA's conduct in this case could be justified, and excused, by reference to this Court's prior decisions. It quite simply cannot.

III. Certiorari Should Be Granted To Decide The Important Question Of Whether The Eleventh Circuit's Deference To The EPA's Regulation Violates Separation Of Powers Principles

In deferring to the EPA's *post hoc* interpretation of the statute, the court of appeals permitted an Executive Branch agency to improperly manipulate the lawsuit's outcome. This raises separation of powers concerns.

As this Court has said, "the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties." *Loving v. United States*, 517 U.S. 748, 757 (1996). The Constitution "gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy – with an understanding, in short, that 'a judgment conclusively resolves the case' because 'a 'judicial Power' is one to render dispositive judgments.'" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995).

In this case, the EPA, by the use of its purported "interpretation" of the CWA, attempts to do what the Supreme Court has forbidden Congress to do – that is, to direct a particular decision in a case without amending the applicable law. *See Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 436 (1992), citing *United States v. Klein*, 80 U.S. 128 (1871). In *Klein*, the Court struck down as unconstitutional a statute dictating the outcome in a pending case and requiring the decision to be made in the government's favor. *United States v.*

Sioux Nation of Indians, 448 U.S. 371, 404 (1980) (characterizing *Klein*). This Court has explained the *Klein* decision thusly:

> Klein, the executor of the estate of a Confederate sympathizer, sought to recover the value of property seized by the United States during the Civil War, which by statute was recoverable if Klein could demonstrate that the decedent had not given aid or comfort to the rebellion. In *United States v. Padelford*, 9 Wall. 531, 542-543, 19 L. Ed. 788 (1869), [the Court] held that a Presidential pardon satisfied the burden of proving that no such aid or comfort had been given. While Klein's case was pending, Congress enacted a statute providing that a pardon would instead be taken as proof that the pardoned individual had in fact aided the enemy, and if the claimant offered proof of a pardon the court must dismiss the case for lack of jurisdiction. [The Court] concluded that the statute was unconstitutional because it purported to "prescribe rules of decision to the Judicial Department of the government in cases pending before it."

French v. Miller, 530 U.S. 327, 348-49 (2000) (citations omitted). A similar thing occurred here when the EPA issued its Regulation, commanding the Eleventh Circuit's deference to a rejected statutory interpretation, just so it could win the case. Indeed, by its Regulation, the agency effectively "assigned to the federal court only rubber stamp work," leaving the plaintiffs with "no judicial audience,"

for the court of appeals saw its task as merely to defer to the "unitary waters" theory, no matter how absurd it or other courts believed the interpretation to be. *Cf. Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 429 (1995). Moreover, the court of appeals in essence decided the pending and stayed rule challenges, leaving all parties without a judicial forum to adjudicate the validity of the Regulation. *See* n.4, *supra*.

This Court has not had occasion to address the application of *Klein* and progeny to, as we have here, an agency's promulgation of a regulation during the pendency of a case in order to alter, manipulate, or prescribe its outcome. The principle announced in *Klein* – that a coequal branch of the government cannot dictate findings or command particular results – applies equally in this setting.

While *Klein* has been somewhat limited by subsequent decisions, that limitation does not come into play here. In *Plaut*, 514 U.S. at 218, the Court said, "[w]hatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" In this case, Congress has not changed the law at all. Rather, the CWA is exactly as it was when this case began. The only change has been the EPA's Regulation, which sets forth a *post hoc* rationalization based on the government's losing litigation arguments in order to alter the case's outcome. Thus, there is a viable separation of powers question under *Klein*, even as limited by its progeny. *Cf. Clark v. United States*, 2007 WL 2142652, at *6 (Fed. Cl. Ct. July 17, 2007) ("While

the government is correct that *Klein* has been limited by subsequent Supreme Court decisions, . . . the government's analysis ignores the unique circumstances of the present case . . . . Neither the Supreme Court nor any Circuit . . . has had the opportunity to opine on the application of *Klein* in such a circumstance . . . . For that reason, *Klein* continues to pose a constitutional question[.]"). Accordingly, certiorari should be granted to consider this important separation of powers question.

And the separation of powers doctrine is implicated in another respect as well: The power of the federal courts is not subject to usurpation by an agency of the Executive Branch. *See, e.g., Plaut*, 514 U.S. at 218 ("The second type of unconstitutional restriction upon the exercise of the judicial power . . . [is] that Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.").[10] Indeed,

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10. *See also Chicago & S. Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 113-14 (1948) ("It has also been the firm and unvarying practice of Constitutional Courts to render no judgments . . . that are subject to later review or alteration by administrative action."); *In re Swanson*, 540 F.3d 1368, 1378-79 (Fed. Cir. 2008) ("The Supreme Court has repeatedly held that 'Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch.'"). *Cf. Alaska Dep't of Envtl. Conserv. v. E.P.A.*, 540 U.S. 461, 511-12 (2004) (Scalia, J., dissenting) ("If a federal agency were to exercise an analogous power to review the decisions of federal courts, the arrangement would violate the well-established rule that the judgments of Article III courts cannot be revised by the

(Cont'd)

> if a judgment of an Article III court were subject to revision by a coordinate branch, it would not be the exercise of *judicial* power. Since neither the legislative branch nor the executive branch has the power to review judgments of an Article III court, an administrative agency such as the [EPA], which is a creature of the legislative and executive branches, similarly has no such power.

Town of Deerfield, N.Y. v. F.C.C., 992 F.2d 420, 428 (2d Cir. 1993) (citation omitted; emphasis original). In this case, when the court of appeals heeded the EPA's absurd interpretation of the CWA, it allowed just that to occur. The court of appeals sanctioned the EPA's use of a Regulation to do what it otherwise could not do – namely, reverse the district court's well-founded conclusions about the meaning of the CWA's permitting provisions. *See id.* (administrative agency has no power to "review judgments of an Article III court"). Thus, the court of appeals allowed the Executive Branch to manipulate the

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(Cont'd)

Executive or Legislative Branches. . . . The principle that judicial decisions cannot be reopened at the whim of the Executive or the Legislature is essential to preserving separation of powers and judicial independence."), citing *Case of Hayburn*, 2 U.S. 408, 410 n.* (1792) ("[B]y the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.") and *Plaut*, 514 U.S. at 211.

Judiciary and dictate a different outcome in a lawsuit, in violation of the separation of powers doctrine.[11]

Therefore, the Court should grant certiorari to make explicit that an agency's after-thought of a Regulation, which effectively usurps the Judiciary's function, may not be accorded deference consistent with the separation of powers doctrine.

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11. Justice Scalia raised similar concerns in his *Brand X* dissent, albeit in a slightly different factual context. There, he argued that the majority's decision allowed for "judicial decisions subject to reversal by executive officers" – a result he found "not only bizarre," but also "probably unconstitutional." *Brand X*, 545 U.S. at 1016, 1017 (Scalia, J., dissenting). In support of this view, Justice Scalia cited one of the separation of powers cases noted above, *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 (1948), wherein the Court held that "Article III courts do not sit to render decisions that can be reversed or ignored by executive officers." *See Brand X*, 545 U.S. at 1017 (Scalia, J.).

CONCLUSION

For all of the important reasons explained above, the Court should grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit to review its decision in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED AND FILED JUNE 4, 2009

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-13829

D.C. Docket No. 02-80309-CV-CMA

FRIENDS OF THE EVERGLADES,
FLORIDA WILDLIFE FEDERATION,

Plaintiffs-
Counter-Defendants-
Appellees
Cross-Appellants,

FISHERMEN AGAINST DESTRUCTION
OF THE ENVIRONMENT,

Plaintiff-
Counter-Defendant
Appellee,

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Intervenor-Plaintiff-
Counter-Defendant-
Appellee
Cross-Appellant,

Appendix A

versus

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Defendant-
Counter-Claimant-
Cross-Appellee,

CAROL WEHLE, Executive Director,

Defendant-
Appellant,

UNITED STATES OF AMERICA,
U.S. SUGAR CORPORATION,

Intervenor-Defendants-
Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(June 4, 2009)

Before DUBINA, Chief Judge, CARNES, Circuit Judge, and GOLDBERG,* Judge.

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* Honorable Richard W. Goldberg , Judge, United States Court of International Trade, sitting by designation.

Appendix A

CARNES, Circuit Judge:

This appeal turns on whether the transfer of a pollutant from one navigable body of water to another is a "discharge of a pollutant" within the meaning of the Clean Water Act, 33 U.S.C. § 1362(12). If it is, a National Pollution Discharge Elimination System permit is required. 33 U.S.C. §§ 1311(a); 1342(a). The Act defines "discharge of a pollutant," but the meaning of that definition is itself disputed. During the course of this litigation, the Environmental Protection Agency adopted a regulation addressing this specific matter. The issue we face, after we dispose of a preliminary Eleventh Amendment question, is whether we owe that EPA regulation deference under *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984).

I.

The unique geography of South Florida is once again before us. *See Miccosukee Tribe of Indians of Fla. v. United States*, __ F.3d __, 2009 WL 1199871, at *1 (11th Cir. May 5, 2009). Lake Okeechobee is part of that geography. Historically, the lake had an ill-defined southern shoreline because during rainy seasons it overflowed, spilling a wide, shallow sheet of water overland to the Florida Bay. "But progress came and

took its toll, and in the name of flood control, they made their plans and they drained the land."[1]

In the 1930s the Herbert Hoover Dike was built along the southern shore of Lake Okeechobee. It was intended to control flooding but failed during the hurricanes of 1947 and 1948. Congress then authorized the Central and Southern Florida Flood Project; as part of it the Army Corps of Engineers expanded the Hoover Dike and built pump stations including S-2, S-3, and S-4. Under the modern version of that project, nearly all water flow in South Florida is controlled by a complex system of gates, dikes, canals, and pump stations.

The area south of Lake Okeechobee's shoreline was designated the Everglades Agricultural Area. The Corps dug canals there to collect rainwater and runoff from the sugar fields and the surrounding industrial and residential areas.[2] Not surprisingly, those canals contain a loathsome concoction of chemical contaminants including nitrogen, phosphorous, and un-ionized ammonia. The water in the canals is full of suspended and dissolved solids and has a low oxygen content.

Those polluted canals connect to Lake Okeechobee, which is now virtually surrounded by the Hoover Dike.

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1. John Anderson, "Seminole Wind," on *Seminole Wind* (BMG Records 1992).

2. The canals are commonly called the EAA canals, and we will refer to them as the agricultural canals, although they also contain industrial and residential runoff.

Appendix A

The S-2, S-3, and S-4 pump stations are built into the dike and pump water from the lower levels in the canals outside the dike into the higher lake water. They do that by spewing water through the dike and into "rim canals" open to the lake. This process moves the water containing Agricultural Area contaminants uphill into Lake Okeechobee, a distance of some sixty feet. The pumps do not add anything to the canal water; they simply move it through pipes. At full capacity, the pumps within the S-2, S-3, and S-4 stations can each move 900 cubic feet of water per second—more than 400,000 gallons per minute. The South Florida Water Management District operates the pumping stations.

Two organizations, the Friends of the Everglades and the Fishermen Against the Destruction of the Environment, filed this lawsuit against the Water District in 2002. The plaintiffs (whom we will call collectively the Friends of the Everglades) sought an injunction to force the Water District to get a permit under the Clean Water Act's National Pollution Discharge Elimination System (NPDES) program before pumping the polluted canal water into the lake. The court allowed a number of interveners to enter the lawsuit. Asserting that the pollution of Lake Okeechobee threatens its way of life, the Miccosukee Tribe joined on the plaintiffs' side. The United States, "on behalf of" the EPA and the Corps, joined on the defense side, as did the U.S. Sugar Corporation. In an amended complaint, the plaintiffs added the Water District's executive director as a defendant.

Appendix A

In early 2006 there was a two-month bench trial in the United States District Court for the Southern District of Florida. *See Miccosukee Tribe v. S. Fla. Water Mgmt. Dist.*, 559 F.3d 1191, 1192-94 (11th Cir. 2009) (describing that trial). After the trial, the district court decided that the Water District was immune under the Eleventh Amendment and dismissed it from the case, but the court kept the executive director in the lawsuit under the *Ex parte Young* doctrine. *See Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441 (1908). It concluded that operating the S-2, S-3, and S-4 pump stations without an NPDES permit violated the Clean Water Act. In June 2007 the court granted an injunction against the executive director of the Water District that required her to "apply . . . for a NPDES permit forthwith." All of the defendants except the Water District appealed the part of the final judgment that enjoined the executive director, while the plaintiffs cross-appealed the part dismissing the Water District under the Eleventh Amendment.

II.

We begin with the cross-appeal, which contests the dismissal of the Water District on Eleventh Amendment immunity grounds. The parties disagree mightily about this issue and had gotten so wrapped up in the arguments about it that none of them had stepped back to ask why it matters. We asked that question of the attorneys at oral argument, and once they got past the deer-in-the-headlights moment they could offer no good reason why we, or they, should care if the Water District

is in or out of this lawsuit. We believe that it does not matter at all.

No party disputes that the executive director of the Water District has been properly sued under the *Ex parte Young* doctrine. That doctrine provides an exception to Eleventh Amendment immunity for lawsuits against state officials as long as the plaintiffs seek only prospective injunctive relief to stop ongoing violations of federal law. *See Fla. Ass'n of Rehab. Facilities, Inc. v. Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1219 (11th Cir. 2000). And that is all the plaintiffs in this case seek. That relief can be obtained as readily by enjoining the real-person executive director as it could be by enjoining both her and the Water District. *See* Fed. R. Civ. P. 25 (providing for automatic substitution of successors upon the death or end of term of the officer named as the original party). If anything, injunctions against real people are more easily enforced than those against corporate or government entities because real people can be put in jail.

At one time it appeared that the Eleventh Amendment issue might matter because the executive director had initially argued that some of the relief requested by the Friends of the Everglades was beyond the proper scope of the *Ex parte Young* doctrine. If true, that part of the requested relief would have been unavailable unless the Water District itself could be sued. But Jonathan Glogau, the attorney representing the Water District, conceded at oral argument that if the plaintiffs are entitled to the relief they seek, all of that

relief can be obtained by enjoining the executive director.[3] We are entitled to rely on that concession because James Nutt, the attorney representing the executive director, assured us at the beginning of the arguments that Glogau would speak on the Eleventh Amendment issue for the executive director as well as for the Water District.

Two-and-a-half weeks after oral argument, however, we received a supplemental letter from attorney Nutt in which, referring to himself in the third person, he stated: "The Executive Director's counsel did not have an opportunity to address the Court's question, posed at the very end, whether the remedies available against the Executive Director through the fiction of *Young* are the same as the remedies available as [sic] against the District were it not immune. They are not." The belated letter is not helpful. As a general matter it is conceivable that remedies available against the executive director might not match those available against the Water District, if it is not protected by the Eleventh Amendment. But we are not dealing with a general

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3. Counsel: In this case, all of the relief that [the plaintiffs] wanted, they got.

> Court: Alright, let me ask you this: Are you now conceding to this Court that under *Ex parte Young*, with the Director in, all of the relief that they are now seeking they can obtain through the Director?
>
> Counsel: Yes.
>
> Court: Okay. (OA Trans., Jan. 16, 2009)

matter. We are dealing with this particular case. The only remedies sought are prospective injunctive relief of the sort which, if granted, would be obtained through judicial process applied against the executive director, who is responsible for the operation of the Water District. *See* Fla. Stat. § 373.083.

The plaintiffs have the greatest interest in the availability of remedies. They are satisfied that, as the attorney for the Water District assured us at oral argument, "the remedies sought by Plaintiffs can be obtained against the Executive Director of the District." We are, too. To enjoin the executive director of the Water District is for all practical purposes to enjoin the Water District. And equity is practical.

An issue is moot "when it no longer presents a live controversy with respect to which the court can give meaningful relief." *Fla. Ass'n of Rehab. Facilities, Inc.*, 225 F.3d at 1217; *see also Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 1951 (1969). To decide a moot issue is to issue an advisory opinion, one unnecessary to the judicial business at hand and outside the authority of Article III courts. *Fla. Ass'n of Rehab. Facilities*, 225 F.3d at 1216-17; *see also B&B Chem. Co. v. United States EPA*, 806 F.2d 987, 989 (11th Cir. 1986) ("A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot."). To decide questions that do not matter to the disposition of a case is to separate Lady Justice's scales from her sword. That we will not do. *Cf.* George E. Allen, *The Law*

as a Way of Life, 27 (1969) ("The scales of justice without the sword is the impotence of law.").

III.

Having disposed of the Eleventh Amendment issue, we turn now to whether the S-2, S-3, and S-4 pumps require NPDES permits. The Clean Water Act bans the "discharge of any pollutant" without a permit. 33 U.S.C. §§ 1311, 1342(a)(1). "Discharge" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

It is undisputed that the agricultural and industrial runoff in the canals contains "pollutants," that Lake Okeechobee and the canals are "navigable waters," and that these three pump stations are "point sources" even though they add nothing to the water as they move it along. *See S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 102, 105, 124 S. Ct. 1537, 1542-43 (2004). The question is whether moving an existing pollutant from one navigable water body to another is an "addition . . . to navigable waters" of that pollutant.[4]

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4. The permitting requirement does not apply unless the bodies of water are meaningfully distinct. *Miccosukee*, 541 U.S. at 112, 124 S. Ct. at 1547. The district court concluded that Lake Okeechobee and the agricultural canals are meaningfully distinct based on ten fact findings that it detailed at considerable length. Our review of those findings is limited to looking for clear error, *see Anderson v. City of Bessemer City*,

(Cont'd)

The district court decided that it is, but that decision came before the EPA adopted its regulation. Our review is *de novo*. *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999).

A.

The Water District's central argument is based on the "unitary waters" theory. That theory is derived from the dictionary definition of the word "addition," which is not defined in the Act. *See generally S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 376, 126 S. Ct. 1843, 1847 (2006) (stating that an undefined statutory term is to be read "in accordance with its ordinary or natural meaning.") (quotation omitted). The dictionary definition of "addition" is "to join, annex, or unite" so as to increase the overall number or amount of something. *Webster's Third New International Dictionary* 24 (1993).

(Cont'd)

470 U.S. 564, 574, 105 S. Ct. 1504, 1512 (1985), and the defendants do not even challenge them as clearly erroneous. Given the fact findings the district court made, we are satisfied that the agricultural canals and Lake Okeechobee are meaningfully distinct water bodies.

The EPA wrote an opinion letter that attempted to build a case for the waters not being meaningfully distinct. That letter is not entitled to *Chevron* deference. *See Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655 (2000) ("Interpretations such as those in opinion letters . . . do not warrant Chevron-style deference."). *Applying Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161 (1944), we find the EPA's informal view of the term "meaningfully distinct" unpersuasively narrow.

The unitary waters theory holds that it is not an "addition . . . to navigable waters" to move existing pollutants from one navigable water to another. An addition occurs, under this theory, only when pollutants first enter navigable waters from a point source, not when they are moved between navigable waters. The metaphor the Supreme Court has adopted to explain the unitary waters theory is: "If one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Miccosukee*, 541 U.S. at 110, 124 S. Ct. at 1545-46 (alteration and quotation marks omitted). Under that metaphor the navigable waters of the United States are not a multitude of different pots, but one pot. Ladling pollution from one navigable water to another does not add anything to the pot. So no NPDES permit is required to do that.

The unitary waters theory has a low batting average. In fact, it has struck out in every court of appeals where it has come up to the plate. *See, e.g., Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York (Catskills I)*, 273 F.3d 481, 491 (2d Cir. 2001) ("[T]he transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit."); *Catskill Mountains Ch. of Trout Unlimited, Inc. v. City of New York (Catskills II)*, 451 F.3d 77, 83 (2d Cir. 2006) (concluding that "[t]he City also reasserts the unitary-water theory of navigable waters. Our rejection of this theory in *Catskills I*, however, is . . . not undermined" by *Miccosukee*, 541

U.S. 95, 124 S. Ct. 1537); *Dague v. City of Burlington*, 935 F.2d 1343, 1354-55 (2d Cir. 1991) (rejecting the idea that pollutants are 'added' only on first entry into any navigable water); *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996) ("[T]here is no basis in law or fact for the district court's 'singular entity' [unitary waters] theory."); *N. Plains Res. Council v. Fidelity Exploration and Dev.*, 325 F.3d 1155, 1163 (9th Cir. 2003). Even the Supreme Court has called a strike or two on the theory, stating in *Miccosukee* that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach." 541 U.S. at 107, 124 S. Ct. at 1544. The Court has not, however, called the theory out yet.

We have no controlling circuit precedent on the unitary waters theory. We did at one time decide to reject it, but that decision was vacated. *See Miccosukee Tribe v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002) (concluding that "addition . . . to navigable waters" includes pumping polluted water from one navigable water body into another), *vacated, Miccosukee*, 541 U.S. at 112, 124 S. Ct. at 1547. Parts of decisions that are vacated and have not been reinstated "have no legal effect whatever. They are void." *United States v. Sigma Int'l, Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002) (en banc). We are free to give statements in a vacated opinion persuasive value if we think they deserve it. *See Tallahassee NAACP v. Leon County*, 827 F.2d 1436, 1440 (11th Cir. 1987).

In *Miccosukee*, 280 F.3d at 1367, we addressed whether the law required an NPDES permit before polluted water could be moved through the S-9 pump from some particular Everglades canals into a water conservation area. In a footnote, we declined to adopt the unitary waters theory. *Id.* at 1368 n.5 ("We reject the Water District's argument that no addition of pollutants can occur unless pollutants are added from the outside world insofar as the Water District contends the outside world cannot include another body of navigable waters."). Instead we said that "the receiving body of water is the relevant body of navigable water" and that "the relevant inquiry is whether—but for the point source—the pollutants would have been added to the receiving body of water." *Id.* at 1368. For that proposition we cited *Catskill I*, a Second Circuit decision rejecting the unitary waters theory. Because the polluted canal water would not have flowed into the conservation area but for S-9's pumping, we concluded that S-9 was adding pollutants to a meaningfully distinct water body, so an NPDES permit was required. *Id.* at 1368-69. The Supreme Court vacated our decision and remanded for further factfindings, however, because the existing record did not convince it that the canals and the water conservation area were meaningfully distinct water bodies. *Miccosukee*, 541 U.S. at 112, 124 S. Ct. at 1547. The Court also stated that the Water District's unitary waters argument was to be available on remand. *Id.*, at 112, 124 S. Ct. at 1547.

In sum, all of the existing precedent and the statements in our own vacated decision are against the

unitary waters theory. That precedent and those statements take the view that the transfer of pollutants from one meaningfully distinct navigable body of water to another is an "addition . . . to navigable waters" for Clean Water Act permitting purposes. If nothing had changed, we might make it unanimous. But there has been a change. An important one. Under its regulatory authority, the EPA has recently issued a regulation adopting a final rule specifically addressing this very question. Because that regulation was not available at the time of the earlier decisions, they are not precedent against it. We are the first court to address the "addition . . . to navigable waters" issue in light of the regulation—to decide whether the regulation is due *Chevron* deference.

B.

The EPA's new regulation, which became final on June 13, 2008, explains that it was adopted to:

> clarify that water transfers are not subject to regulation under the National Pollution Discharge Elimination System (NPDES) permitting program. This rule defines water transfers as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use.

NPDES Water Transfers Rule, 73 Fed. Reg. 33,697-708 (June 13, 2008) (codified at 40 C.F.R. § 122.3(i)). Everyone agrees that the EPA's regulation is entitled to *Chevron* deference if it is a reasonable construction of an ambiguous statute. Under *Smiley v. Citibank*, 517 U.S. 735, 740-41, 116 S. Ct. 1730, 1734 (1996), and *United States v. Morton*, 467 U.S. 822, 835 n.21, 104 S. Ct. 2769, 2776 n.21 (1984), it does not matter that the regulation was proposed and issued well after the beginning of this lawsuit. Neither does it matter if it was done in response to this or similar lawsuits. *See Barnhart v. Walton*, 535 U.S. 212, 221, 122 S. Ct. 1265, 1271 (2002). Nor does it matter whether the new regulation is a dramatic shift in EPA policy. *Natl. Cable & Telecomm. Assoc. v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S. Ct. 2688, 2699, 162 L. Ed. 2d 820 (2005) ("Agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.").

All that matters is whether the regulation is a reasonable construction of an ambiguous statute. *Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *id.* at 844, 104 S. Ct. at 2782 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."); *Sierra Club v. Johnson*, 541 F.3d 1257, 1265 n.3 (11th Cir. 2008) ("[A] court must give effect to an agency's reasonable interpretation of

an ambiguous statute."). In other words, there must be two or more reasonable ways to interpret the statute, and the regulation must adopt one of those ways. Those two requirements are obviously intertwined. *See* Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 Va. L. Rev. 597 (2009); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 Yale J. on Reg. 1, 30 (1998) (examining 200 court of appeals cases applying *Chevron* and finding that in 28 percent of them the inquiry was collapsed into the single question of whether the interpretation was reasonable).

The Friends of the Everglades' position is that the EPA's regulation does not warrant *Chevron* deference because the meaning of the "addition . . . to navigable waters" language is clear and its lack of ambiguity forecloses the unitary waters theory. *Cf., e.g., Ala. Power Co. v. U.S. Dep't of Energy*, 307 F.3d 1300, 1312 (11th Cir. 2002) (finding that, because "using traditional tools of statutory construction," the Nuclear Waste Policy Act provision in question was clear, no level of deference applied to the agency's contrary interpretation); *Brand X*, 545 U.S. at 982-83, 125 S. Ct. at 2700 ("Only a judicial precedent holding that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill, displaces a conflicting agency construction."). The defendants have two alternative positions. Their bolder position is that the EPA's regulation mirrors the unambiguous meaning of the statute. Their more modest one is that even if the statute is ambiguous, the regulation is one

reasonable interpretation of it. The true conflict, and most of our discussion, centers on whether there is ambiguity.

C.

Both sides pitch several decisions to us. The Water District, arguing for ambiguity, throws us *National Wildlife Federation v. Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988), and *National Wildlife Federation v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). In those cases the courts concluded that the "discharge of a pollutant" language in the Clean Water Act was ambiguous and deferred to the EPA's view that dams did not add pollutants, which meant that no NPDES permits were necessary. 862 F.2d at 584-85; 693 F.2d at 183. The issues those cases addressed, however, were different from the one before us.

In *Gorsuch* the National Wildlife Federation sued the EPA for failing to require NPDES permits for dams. 693 F.2d at 161. The man-made dams and their reservoirs caused changes in the water's temperature, nutrient loads, and oxygen content, and the affected water was then released through the dams into the rivers below. *Id.* The EPA gave two reasons why no permit was required: (1) the changes caused by the dams were not pollutants; and (2) even if they were, releasing water through a dam did not add those pollutants to the water, because the water would have reached the downstream river anyway, and its passage through the dam did not change it. *Id.* at 165. The D.C. Circuit concluded that

neither the language of the statute nor its legislative history conclusively supported either side's position about what "discharge of a pollutant" meant under the circumstances of that case, so the court deferred to the EPA's position.[5] *Id.* at 175, 183.

In doing so, the *Gorsuch* court accepted the EPA's position that colder water and changes in its oxygen and dissolved nutrient content were not pollutants at all. *Id.* at 174. That rendered irrelevant whether the changed water was being 'added' to navigable water by its movement through a dam. In any event, the water was moving from a river above a dam to the same river below it. Because the facts of the case did not present the issue of whether the transfer of pollutants from one body of water to a different body of water adds pollutants to the navigable waters, the *Gorsuch* court could not have decided that issue. *Watts v. BellSouth Telcomms., Inc.*, 316 F.3d 1203, 1207 (11th Cir. 2003) ("Whatever their opinions say, judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced."); *United States v. Aguillard*, 217 F.3d 1319, 1321 (11th Cir. 2000) (same). It follows that the court also could not have decided whether the statutory language was ambiguous regarding that issue, which is the one before us. Language can be ambiguous in some respects but not in others.

5. *Gorsuch* predates *Chevron* but applied a substantially similar level of deference. *See* 693 F.2d at 181 ("We hold merely that EPA's interpretation is reasonable, not inconsistent with congressional intent, and entitled to great deference; therefore, it must be upheld.").

The other decision the Water District pitches us is *Consumers Power*, 862 F.2d 580. In that case a power plant sucked water containing some unlucky fish out of Lake Michigan, pumped the water uphill, and then directed it and the fish back downhill through turbines that generated electricity. 862 F.2d at 581. In the process the turbines pureed some of the fish and spewed the fish puree back into Lake Michigan. *Id.* at 581-82. The plant was a "dam" for permitting purposes because part of the generating process involved impounding water. *Id.* at 589-90. Deferring to the EPA's position, the Sixth Circuit concluded that "any entrained fish released with the . . . facility's turbine generating water originate in Lake Michigan and do not enter the Lake from the outside world." *Id.* at 585. Fish, living or dead, are biological material under the Clean Water Act, and the fish in *Consumers Power* had always existed in the same lake to which the power plant returned them. *See id.* Accordingly, the court did not have before it, and so could not have decided, whether moving pollutants between different bodies of navigable water constitutes an addition of pollutants to navigable waters. *See Watts*, 316 F.3d at 1207.

Gorsuch and *Consumers Power* involved water that wound up where it would have gone anyway. That is not this case. Water from the agricultural canals would not flow upstream into Lake Okeechobee if the S-2, S-3, and S-4 pumps did not move it there. Here, unlike in *Gorsuch* and *Consumers Power*, pollutants are being moved

between meaningfully distinct water bodies.[6] The fact that those decisions found the statute ambiguous as applied to different factual situations is of little help to the Water District. *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 950 (2002) (explaining that the inquiry as to whether a statute is ambiguous is undertaken "with regard to the particular dispute in the case"); *United States v. Santos*, __ U.S. __, 128 S. Ct. 2020, 2024 (2008) (noting that "context gives meaning" with regard to the circumstances under which a statute is ambiguous). Context means a lot.

The Friends of the Everglades, arguing against ambiguity, pitch us other decisions. *See, e.g., Catskills I*, 273 F.3d at 481; *Catskills II*, 451 F.3d at 77; *Miccosukee*, 280 F.3d at 1367, *vacated*, 541 U.S. at 112, 124 S. Ct. at 1547; *Dubois*, 102 F.3d at 1273. They argue that all of the courts of appeals that have addressed the issue have found that "any addition of any pollutant to navigable waters" includes moving polluted water between meaningfully distinct water bodies. That statement depends, however, on what one means by "the issue." Each decision the Friends of the Everglades rely on addressed which interpretation of the statutory language was most plausible or preferable. Because they all came out before the EPA's new regulation went into effect, none of those decisions addressed the issue before us, which is whether the EPA's interpretation of the statutory language is reasonable, even if we might

6. *See supra* p. 11, n.2.

prefer another one. Deciding how best to construe statutory language is not the same thing as deciding whether a particular construction is within the ballpark of reasonableness. *See Brand X*, 545 U.S. at 980, 125 S. Ct. at 2699 ("*Chevron* requires a federal court to accept the agency's construction of the statute, even if the agency's reading differs from what the court believes is the best statutory interpretation."); *Shotz v. City of Plantation*, 344 F.3d 1161, 1178 (11th Cir. 2003) (observing that "in the absence of an administrative interpretation," a court must impose its own construction on the statute).

Still, the Friends of the Everglades urge us to infer from the opinions in those other cases that the courts believed the Act's language unambiguously requires a permit in these circumstances, and they argue that we should be persuaded by that inference. In the *Catskills* cases, the Second Circuit held that pumping polluted water from the Schoharie Reservoir into the Esopus Creek required an NPDES permit. *Catskills I*, 273 F.3d at 489. Those water bodies were hydrologically connected; they both flowed into the Hudson River. But because of directional flow and gravity, waters from the reservoir "under natural conditions . . . would never reach Esopus Creek." *Id.* at 484. The Second Circuit stated that "[n]o one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the 'same.'" *Id.* at 492.

The Second Circuit then brushed aside the EPA's informal opinion that no permit was required. The court

cited the "ordinary meaning" of the statutory text, especially the word "addition," and called the "'singular entity' theory of navigable waters . . . . inconsistent with the ordinary meaning of the word 'addition.'" *Id.* at 493. It concluded that "none of the statute's broad purposes sways us from what we find to be the plain meaning of its text . . . We find that the textual requirements of the . . . definition of 'discharge of a pollutant' in § 1362(12) are met here." *Id.* at 494. In *Catskills II* that court confirmed its holding. In doing so, it found unpersuasive the EPA's 2005 guidance letter, which reiterated the EPA's view that a permit was not required. That letter, the court explained, "simply overlooked [the] plain language [of the statute]." 451 F.3d at 84. The letter was not entitled to, and did not receive, *Chevron*-level deference. *Id.* at 82. It only warranted and received *Skidmore* consideration for persuasive value, which is a significantly less deferential standard. *Id.*

Importantly, the Second Circuit explicitly refused to foreclose the possibility that its decision might be different if *Chevron* deference applied. 273 F.3d at 490 ("If the EPA's position had been adopted in a rulemaking or other formal proceeding, deference of the sort applied by the *Gorsuch* and *Consumers Power* courts might be appropriate."). That is the situation we have here.

Our opinion in *Miccosukee* followed the same line of reasoning as the Second Circuit in the *Catskills* cases and reserved the same question, which is the question before us now. *Miccosukee*, 280 F.3d at 1367, *vacated*,

541 U.S. at 112, 124 S. Ct. at 1547. In *Miccosukee* we stated our belief that the Clean Water Act required an NPDES permit for transfers of polluted water between meaningfully distinct water bodies, but we qualified that conclusion. 280 F.3d at 1369. We pointed out that we could "ascertain no EPA position applicable to S-9 to which to give *any* deference, much less *Chevron* deference." *Id.* at 1368 n.4. Now there is an EPA regulation that poses the *Chevron* issue missing from the *Miccosukee* case.[7]

None of the decisions the parties have thrown our way helps either side much. The Water District's decisions found ambiguity in the relevant provision of the Clean Water Act as it applied to dams involving the same bodies of water, not to pumps transferring pollutants between meaningfully distinct bodies of water. The Friends of the Everglades' decisions, though involving the same factual context, decided only how best to construe the statutory language—not whether that language is ambiguous and could reasonably be construed another way. We turn to that issue now.

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7. The *Dubois* case is similar to *Miccosukee* and the *Catskills* cases. In *Dubois* the First Circuit held that transferring pollutants from a river to a pond required an NPDES permit because the court wanted to avoid "a watering down of Congress' clear statutory protections." 102 F.3d at 1299. However, the court did not apply *Chevron* deference, *id.* at 1285 n.15, and it does not appear that the Forest Service had promulgated a regulation that the court could have deferred to even if it had desired to do so. *Id.* at 1296-99.

Appendix A

IV.

In the first step of *Chevron* analysis we apply the traditional tools of statutory construction to ascertain whether Congress had a specific intent on the precise question before us. *See Chevron*, 467 U.S. at 843 n.9, 104 S. Ct. at 2782 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). If Congress did, then the statute is not ambiguous and *Chevron* has no role to play. The traditional tools of statutory construction include "examination of the text of the statute, its structure, and its stated purpose." *Miami-Dade County v. United States EPA*, 529 F.3d 1049, 1063 (11th Cir. 2008); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 846 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").[8]

A.

The Clean Water Act outlaws "the discharge of any pollutant" subject to several exceptions, one of which is where an NPDES permit is obtained. 33 U.S.C. §§ 1311,

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8. Recently, we reluctantly concluded that in determining for *Chevron* purposes whether Congress had an intent on the issue at hand, we also look to legislative history. *Miccosukee*, 2009 WL 1199871 at *14. We do that on page 34, infra.

1342(a)(1). "Discharge" includes "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). "Navigable waters," in turn, is defined as "the waters of the United States." 33 U.S.C. § 1362(7). The Supreme Court has recently instructed that the term "discharge of pollutants" and its definition is "of particular significance" within a "complicated statute." *S.D. Warren Co.*, 547 U.S. at 380, 126 S. Ct. at 1850.

The question is whether "addition . . . to navigable waters"—meaning addition to "the waters of the United States"—refers to waters in the individual sense or as one unitary whole. Under the Water District's unitary waters theory, "to navigable waters" means to *all* navigable waters as a singular whole. As a result, pollutants can be added to navigable waters only once, and pollutants that are already in navigable waters are not added to navigable waters again when moved between water bodies. Conversely, the Friends of the Everglades' position is that "to navigable waters" refers to each individual water body. As a result, the statute means "any addition of any pollutant to *any* navigable waters," even though those are not the words the statute uses. Under the Friends of the Everglades' reading, pollutants existing in one navigable water, like the agricultural canals, are "added . . . to navigable waters" when they are transferred into another navigable water, like Lake Okeechobee.

The common meaning of the term "waters" is not helpful. In ordinary usage "waters" can collectively refer

to several different bodies of water such as "the waters of the Gulf coast," or can refer to any one body of water such as "the waters of Mobile Bay." An "addition . . . to navigable waters" could encompass any addition to a single body of navigable water regardless of source (like water pumped from one navigable body of water to another), or it could mean only an addition to the total navigable waters from outside of them (like a factory pumping pollutants into a navigable stream). Because the statutory language could be used either way, we turn next to its immediate context.

B.

The context in which language is used is important. *See Robinson*, 519 U.S. at 341, 117 S. Ct. at 846; *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60, 125 S. Ct. 460, 467 (2004) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because the same terminology is used elsewhere in a context that makes its meaning clear . . . ."); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132, 120 S. Ct. 1291, 1300-01 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."). The Water District argues that the context of 33 U.S.C. § 1362(12) demonstrates that Congress intentionally selected each word in the definition of "discharge" to deliver a specific meaning. It asserts that the Friends of the Everglades' reading of the statute would require us to add words to the law, which is impermissible.

"Discharge" is defined in the Act as "[a]ny addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). According to the Water District, the conspicuous absence of "any" before "navigable waters" in § 1362(12) supports the unitary waters theory because it implies that Congress was not talking about *any* navigable water, but about *all* navigable waters as a whole. The Friends of the Everglades' reading effectively asks us to add a fourth "any" to the statute so that it would read: "Any addition of any pollutant to *any* navigable waters from any point source." But we are not allowed to add or subtract words from a statute; we cannot rewrite it. *See 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 596, 71 S. Ct. 515, 518 (1951) (we are not "to add nor to subtract, neither to delete nor to distort [the words]" Congress has used); *Blount v. Rizzi*, 400 U.S. 410, 419, 91 S. Ct. 423, 429 (1971) ("[I]t is for Congress, not this Court, to rewrite the statute."); *Nguyen v. United States*, 556 F.3d 1244, 1256 (11th Cir. 2009) ("We are not authorized to rewrite, revise, modify, or amend statutory language in the guise of interpreting it . . . ."); *Albritton v. Cagle's, Inc.*, 508 F.3d 1012, 1017 (11th Cir. 2007) ("We are not empowered to rewrite statutes."). Besides, if the meaning of language is plain, no alteration should be necessary to clarify it. The addition or subtraction of words indicates that the unaltered language is not plain.

There is also the fact that Congress knows how to use the term "any navigable water[s]" when it wants to protect individual water bodies instead of navigable

waters as a collective whole. Within the Clean Water Act itself, Congress authorized the EPA to investigate "the pollution of any navigable waters," 33 U.S.C. § 1254(a)(3), and referred to the EPA's dissemination of information about changes in the flow "of any navigable waters." 33 U.S.C. § 1314(f)(2)(F). Other water protection statutes also use the term "any navigable water[s]." *See, e.g.*, 33 U.S.C. § 407 ("It shall not be lawful to throw, discharge, or deposit . . . any refuse matter . . . into any navigable water of the United States. . ."); 33 U.S.C. § 419 ("The Secretary of the Army is authorized . . . to govern the transportation and dumping into any navigable water, or waters adjacent thereto, of dredgings, earth, garbage, and other refuse materials . . ."); 33 U.S.C. § 512 ("No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States."). The common use by Congress of "any navigable water" or "any navigable waters" when it intends to protect each individual water body supports the conclusion that the use of the unmodified term "navigable waters" in § 1362(12) (or the use in its definition, "the waters of the United States," at § 1362(7)) means the waters collectively. *See Delgado v. United States Att'y Gen.*, 487 F.3d 855, 862 (11th Cir. 2007) ("[W]here Congress knows how to say something but chooses not to, its silence is controlling.") (quotation marks omitted); *DirecTV, Inc. v. Brown*, 371 F.3d 814, 818 (11th Cir. 2004) ("[W]hen Congress uses different language in similar sections, it intends different meanings.") (quoting *Iraola & CIA, S.A. v. Kimberly-Clark Corp.*, 232 F.3d 854, 859 (11th Cir. 2000).

That context does not, however, establish that the meaning of the statutory language is clear. Although Congress did use the term "any navigable waters" in the Clean Water Act to protect individual water bodies, it also used the unmodified "navigable waters" to mean the same thing. For example, as the Supreme Court noted in *Miccosukee*, 541 U.S. at 107, 124 S. Ct. at 1544, the Act discusses the states' creation of water-body-specific quality standards based on "the designated uses of the navigable waters involved." 33 U.S.C. § 1313(c)(2). In that context "the navigable waters" must refer to many individual water bodies—exactly what the Friends of the Everglades contend that it means in 33 U.S.C. § 1362(12) ("Any addition of any pollutant to navigable waters . . ."). *See also Miccosukee*, 541 U.S. at 106-07, 124 S. Ct. at 1544 (citing § 1313(c)(2) and stating that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach.").

The result so far is that we are not persuaded that the meaning of the statutory provision at issue, read either in isolation or in conjunction with similar provisions, is plain one way or the other. The statutory context indicates that sometimes the term "navigable waters" was used in one sense and sometimes in the other sense.

C.

The "broader context of the statute as a whole" does not resolve the ambiguity. *Robinson*, 519 U.S. at 341, 117 S. Ct. at 846; *Koons Buick*, 543 U.S. at 60, 125 S.

Ct. at 467 (explaining that a seemingly ambiguous provision may be clarified by the broad context of the statute if "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."). The general purpose of the Clean Water Act is broad and ambitious:

> The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter— (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985. . . .

33 U.S.C. § 1251(a). The NPDES permitting program is the centerpiece of the Clean Water Act. *See, e.g., Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 990 (D.C. Cir. 1997); *Gorsuch*, 693 F.2d at 175-76 ("There is indeed some basis in the legislative history for the position that Congress viewed the NPDES program as its most effective weapon against pollution."). In light of the sweeping goals of the Act, the Senate Conference Report states that the "conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation . . .".[9] S. Conf. Rep. 92-1236

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9. That statement appears intended to extend the application of the Clean Water Act to cover as much water as the Commerce Clause would allow. *See generally Rapanos*, 547

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(1972), *as reprinted in* 1972 U.S.C.C.A.N. 3776, 3822. The Friends of the Everglades argue that, for two reasons, the Clean Water Act's ambitious anti-pollution goals make it absurd to read the Act as implicitly creating a sizeable exception to the NPDES permitting program for pollutants that come from other navigable waters.

First, they assert that the permitting program itself is designed to protect individual water bodies. State water quality standards, which are specific to individual water bodies, are intertwined with the NPDES permitting process. If a water body fails to meet the state water quality standards, the government alters the terms of the NPDES permits held by contributing point sources in order to ratchet down the load of pollutants that may be pumped into that water body. *Miccosukee*, 541 U.S. at 107, 124 S. Ct. at 1544; 33 U.S.C. § 1313(d). Given the permitting requirement's role in maintaining individualized water quality standards, the Friends of the Everglades argue that it would make little sense to allow uncontrolled, un-permitted pumping between navigable waters that could have different quality standards. Lake Okeechobee, for example, is classified as drinking water under the state water quality standards. Pumping dirty agricultural canal water into the lake makes it more difficult to meet the lake's quality standards. To allow such pumping without a permit

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U.S. at 715, 126 S. Ct. at 2208. The question before us is not the constitutional reach of the Act but the meaning of specific statutory language where the Act does apply.

tends to undermine the goals of the NPDES program. The Friends of the Everglades argue that the unitary waters theory, which would exclude from the permitting requirement the pumping of pollutants into the lake, is an unreasonably narrow reading of the Act.

Second, the Friends of the Everglades argue that reading the statute to protect only the navigable waters as one unitary whole could lead to results even more absurd than pumping dirty canal water into a reservoir of drinking water. If an "addition . . . to navigable waters" occurs only at a pollutant's first entry into navigable waters, and never again when it is transferred to a different water body, then the NPDES program— the centerpiece of the Clean Water Act— would require no permit for a project to pump the most loathsome navigable water in the country into the most pristine one.

These horrible hypotheticals are frightening enough that we might agree with the Friends of the Everglades that the unitary waters theory does not comport with the broad, general goals of the Clean Water Act. *See generally* 33 U.S.C. § 1251(a) ("to restore and maintain the chemical, physical, and biological integrity of the Nation's waters"). But we "interpret and apply statutes, not congressional purposes." *In re Hedrick*, 524 F.3d 1175, 1188 (11th Cir. 2008); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79, 118 S. Ct. 998, 1002 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); *Norfolk Southern R. Co. v.*

Sorrell, 549 U.S. 158, 171, 127 S. Ct. 799 (2007) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law.") (citation omitted). And there are other provisions of the Clean Water Act that do not comport with its broad purpose of restoring and maintaining the chemical, physical and biological integrity of the Nation's waters. (Which may help explain why the Act's express goal of completely eliminating all discharge of pollutants into the navigable waters by 1985 was not met.)

No one disputes that the NPDES program is restricted to point sources. Non-point source pollution, chiefly runoff, is widely recognized as a serious water quality problem, but the NPDES program does not even address it. *See generally Rapanos*, 547 U.S. at 777, 126 S. Ct. at 2247 (Kennedy, J., concurring) (observing that agricultural runoff from farms along the Mississippi River creates an annual hypoxic 'dead zone' in the Gulf of Mexico that is nearly the size of New Jersey); *Oregon Natural Desert Ass'n v. United States Forest Serv.*, 550 F.3d 778, 780 (9th Cir. 2008) (stating that the "disparate treatment of discharges from point sources and nonpoint sources is an organizational paradigm of the [Clean Water] Act"). Not only are ordinary non-point sources outside the NPDES program, but Congress even created a special exception to the definition of "point source" to exclude agricultural storm water discharges and return flows from irrigation, despite their known, substantially harmful impact on water quality. 33 U.S.C. § 1362(14).

The point is that it may seem inconsistent with the lofty goals of the Clean Water Act to leave out of the permitting process the transfer of pollutants from one navigable body of water to another, but it is no more so than to leave out all non-point sources, allowing agricultural run-offs to create a huge "dead zone" in the Gulf of Mexico. Yet we know the Act does that. What this illustrates is that even when the preamble to legislation speaks single-mindedly and espouses lofty goals, the legislative process serves as a melting pot of competing interests and a face-off of battling factions. What emerges from the conflict to become the enactment is often less pure than the preamble promises. The provisions of legislation reflect compromises cobbled together by competing political forces and compromise is the enemy of single-mindedness. It is not difficult to believe that the legislative process resulted in a Clean Water Act that leaves more than one gap in the permitting requirements it enacts. *Wyeth v. Levine*, __ U.S. __, 129 S. Ct. 1187, 1215-16 (2009) (Thomas, J., concurring) ("Legislators may compromise on a statute that does not fully address a perceived mischief, accepting half a loaf to facilitate a law's enactment.") (quotation omitted); *Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 373-74, 106 S. Ct. 681, 688-89 (1986) ("Application of 'broad purposes' of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. . . . the final language of the legislation may reflect hard-fought compromises.").

As the Supreme Court once said, "[a]fter seizing every thing from which aid can be derived we are left with an ambiguous statute." *United States v. Bass*, 404 U.S. 336, 347, 92 S. Ct. 515, 522 (1971) (internal citation and alteration omitted). There are two reasonable ways to read the § 1361(12) language "any addition of any pollutant to navigable waters from any point source." One is that it means "any addition . . . to [any] navigable waters;" the other is that it means "any addition . . . to navigable waters [as a whole]." As we have held before, "the existence of two reasonable, competing interpretations is the very definition of ambiguity." *United States v. Acosta*, 363 F.3d 1141, 1155 (11th Cir. 2004) (quotation marks omitted).

D.

Having concluded that the statutory language is ambiguous, our final issue is whether the EPA's regulation, which accepts the unitary waters theory that transferring pollutants between navigable waters is not an "addition . . . to navigable waters," is a permissible construction of that language. *Chevron*, 467 U.S. at 843, 104 S. Ct. at 2782. In making that determination, we "need not conclude that the agency construction was . . . the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 837, 843 n.11, 104 S. Ct. at 2782 n. 11; *see also id.* at 844, 104 S. Ct. at 2782 ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."). Because the EPA's construction is one of

the two readings we have found is reasonable, we cannot say that it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S. Ct. at 2782.

Sometimes it is helpful to strip a legal question of the contentious policy interests attached to it and think about it in the abstract using a hypothetical. Consider the issue this way: Two buckets sit side by side, one with four marbles in it and the other with none. There is a rule prohibiting "any addition of any marbles to buckets by any person." A person comes along, picks up two marbles from the first bucket, and drops them into the second bucket. Has the marble-mover "add[ed] any marbles to buckets"? On one hand, as the Friends of the Everglades might argue, there are now two marbles in a bucket where there were none before, so an addition of marbles has occurred. On the other hand, as the Water District might argue and as the EPA would decide, there were four marbles in buckets before, and there are still four marbles in buckets, so no addition of marbles has occurred. Whatever position we might take if we had to pick one side or the other of the issue, we cannot say that either side is unreasonable.

Like the marbles rule, the Clean Water Act's language about "any addition of any pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), is ambiguous. The EPA's regulation adopting the unitary waters theory is a reasonable, and therefore permissible, construction of the language. Unless and until the EPA rescinds or Congress overrides the regulation, we must give effect to it.

Appendix A

In the defendants' appeal, we REVERSE the district court's judgment that the operation of the S-2, S-3, and S-4 pumps without NPDES permits violates the Clean Water Act. We DISMISS AS MOOT the plaintiffs' cross-appeal from the dismissal of the Water District on Eleventh Amendment grounds.

REVERSED in part and DISMISSED in part.

APPENDIX B — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED JUNE 14, 2007 AND FILED JUNE 15, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 02-80309-CIV-ALTONAGA/Turnoff

FRIENDS OF THE EVERGLADES, INC., et al.,

Plaintiffs,

vs.

HENRY DEAN, Executive Director, South Florida Water Management District, in his official capacity; *et al.*,

Defendants.

FINAL JUDGMENT

THIS CAUSE came before the Court upon the Order on Remedies issued separately on this date. Pursuant to the Order on Remedies and the Court's December 11, 2006 Order Setting Forth Findings of Fact and Conclusions of Law [D.E. 636], it is

Appendix B

ORDERED AND ADJUDGED as follows:

(1) A declaratory judgment is issued in favor of Plaintiffs. In the absence of a National Pollutant Discharge Elimination System ("NPDES") permit, the South Florida Water Management District's ("SFWMD['s]") operation of the S-2, S-3, and S-4 pump stations to backpump pollutant-containing waters from the canals in a northerly direction into Lake Okeechobee is in violation of the Clean Water Act.

(2) A permanent injunction is issued in favor of Plaintiffs. The SFWMD's Executive Director shall apply to the Florida Department of Environmental Protection for a NPDES permit forthwith.

(3) The Court shall retain jurisdiction, including to the extent allowable in light of the parties' anticipated appeal, to ensure compliance with this Judgment. Furthermore, the Court retains jurisdiction over Plaintiffs' request for the award of attorney's fees and costs.

DONE AND ORDERED in Chambers at Miami, Florida, this 14th day of June, 2007.

s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER ON REMEDIES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED JUNE 14, 2007 AND FILED JUNE 15, 2007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 02-80309-CIV-ALTONAGA/Turnoff

FRIENDS OF THE EVERGLADES, INC., et al.,

Plaintiffs,

vs.

HENRY DEAN, Executive Director, South Florida Water Management District, in his official capacity; *et al.*,

Defendants.

ORDER ON REMEDIES

THIS CAUSE came before the Court upon the parties' memoranda on injunctive relief and remedies;[1]

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1. Plaintiffs, Friends of the Everglades ("FOE"), Fishermen Against Destruction of the Environment, Inc. ("FADE"), and Florida Wildlife Federation's ("FWF['s]") Memorandum on Injunctive Relief and Remedies [D.E. 649]; Intervenor-Plaintiff, the Miccosukee Tribe of Indians of

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Appendix C

Plaintiffs' and Plaintiff-Intervenor's Joint Motion for Joinder of Mike Sole, in his Official Capacity as Secretary of the Florida Department of Environmental Protection, as an Involuntary Plaintiff [D.E. 653], filed on March 6, 2007; Intervenor-Defendant, U.S. Sugar's Motion to Strike Plaintiffs' Exhibits to Plaintiffs' Memorandum on Injunctive Relief and Remedies [D.E. 665], filed on April 13, 2007; and Defendant, the SFWMD's Motion for Certification Under § 1292(b) [D.E. 689], filed on June 4, 2007. The Court has carefully considered the parties' written submissions, the record, and applicable law.

I. *BACKGROUND*

On December 11, 2006, after a bench trial, the undersigned issued an Order Setting Forth Findings of Fact and Conclusions of Law (the "December 11 Order"), which concluded, in pertinent part, that "in the absence of a [National Pollution Discharge Elimination System ("NPDES")] permit, the operation of the S-2, S-3, and S-4 pump stations to backpump pollutant-containing

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Florida's (the "Tribe['s]") Brief in Support of Appropriate Final Judgment Remedies and Procedures [D.E. 654]; Defendants, South Florida Water Management District (the "SFWMD") and Carol Wehle's ("Wehle['s]") Response in Opposition to Plaintiffs' Memoranda Regarding Remedies [D.E. 673]; Intervenor-Defendant, United States' Remedy Brief [D.E. 662]; Intervenor-Defendant, United States Sugar Corporation's ("U.S. Sugar['s]") Memorandum on Remedies and Post-Trial Proceedings [D.E. 664]; and the reply briefs filed by the parties.

waters from the canals in a northerly direction into Lake Okeechobee is in violation of the [Clean Water Act]." (*Dec. 11 Order* [D.E. 636] at 106). Finding that the issue had not been fully briefed, the Court did not rule, at that time, on Plaintiffs' request that the Court issue an injunction requiring the SFWMD and/or its Executive Director to obtain a NPDES permit for the SFWMD's backpumping activities. (*See id.*).

The parties have submitted lengthy briefs regarding what particular injunctive relief, if any, the Court should order. Plaintiffs and Intervenor-Plaintiff, in their briefs regarding remedies, have taken the position that the Court should enter an injunction requiring the SFWMD's Executive Director[2] to apply for a NPDES permit and should hold additional hearings to determine what interim injunctive relief should be granted while that NPDES permit application is pending.

Defendants, the SFWMD and Wehle, agree that, given the December 11 Order, the SFWMD must submit to the state's NPDES permitting scheme (although they argue an injunction is not necessary because they will voluntarily comply with that requirement). Defendants further argue that the Court should issue a final interpretive judgment and retain jurisdiction to ensure

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2. In the December 11 Order, the Court found that the SFWMD enjoyed sovereign immunity from Plaintiffs' suit. The SFWMD, however, has conceded that the case may proceed against its Executive Director under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

compliance with that judgment.[3] (*See SFWMD Remedies Br.* [D.E. 673] at 23). They also maintain that the Court does not have the authority to, nor should it, order any type of interim injunctive relief. (*See id.* at 3-23).

II. *ANALYSIS*

A. Issuance of Injunction Requiring the SFWMD to Apply for NPDES Permit

1. *Legal Standard*

A party is entitled to the issuance of a permanent injunction where the party has established: (1) the violation of a right asserted in the complaint (success on the merits in the party's case); (2) that there is no adequate remedy at law for the violation of the right; and (3) that irreparable harm will result if the court does not order injunctive relief. *See Alabama v. United States Army Corps of Eng'rs*, 424 F.3d 1117, 1128 (11th Cir.

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3. Intervenor-Defendant, United States, agrees that an order requiring the SFWMD/Wehle to apply for a NPDES permit would be appropriate in this case. (*See U.S. Remedies Br.* [D.E. 662] at 3). Intervenor-Defendant, U.S. Sugar, also appears to agree that an injunction requiring compliance with the NPDES permitting scheme would be appropriate should the Court find that, at trial, Plaintiffs met their burden of proving irreparable harm and that such an injunction would be in the public interest. (*See U.S. Sugar Remedies Br.* [D.E. 664] at 46-47). U.S. Sugar has also taken the position that the issuance of interim injunctive relief would be inappropriate in this case. (*See id.* at 3).

2005). Because issuance of an injunction is an equitable remedy, the Court must also balance the hardships between the parties and give due regard to the public interest in fashioning an appropriate remedy. *See Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

2. *Issuance of Injunction is Warranted Here*

As more fully set forth in the Court's December 11 Order,[4] Plaintiffs have established a violation of the CWA, prevailing on the merits of their claim. Such a violation of the CWA may only be remedied by the issuance of equitable relief, and the Court finds that there is no adequate remedy at law. The outstanding questions, then, are whether: (1) Plaintiffs established at trial the existence of irreparable harm, and (2) the balance of hardships and the public interest favor the issuance of an injunction requiring that the SFWMD's Executive Director apply for a NPDES permit.

a. *Irreparable Harm*

Plaintiffs contend that they established at trial that irreparable harm will result if their requested relief is not granted. In support of this argument, they cite to the testimony of Dr. Tom Crisman, who testified that the backpumping at issue creates a significant risk of triggering a toxic algal bloom that could cause serious injury to humans and death to wildlife. (*See Pls.*

4. The Court adopts in this Order the Findings of Fact and Conclusions of Law set forth in the December 11 Order.

Remedies Brief [*D.E.* 649] at 4-5). In addition, Plaintiffs contend that the trial testimony established that backpumping and disinfection create toxic disinfection byproducts that can sicken humans. (*See id.* at 5). Finally, Plaintiffs contend that the trial testimony established that backpumping causes irreparable ecological harm to Lake Okeechobee. (*See id.* at 6). Defendants do not seriously challenge these assertions, and the undersigned finds that Plaintiffs have met their burden of showing the potential for irreparable harm in the absence of a permanent injunction.

b. *Balance of Equities and Public Interest*

Plaintiffs contend that the irreparable harm they illustrated at trial outweighs any inconvenience to Defendants that will result from the issuance of an injunction requiring a NPDES permit. (*See id.* at 6). They also assert that the public interest in safe water supplies and the ecological integrity of Lake Okeechobee favor the issuance of such an injunction. (*See id.*). The undersigned agrees and finds that equitable considerations favor the issuance of an injunction requiring that the SFWMD's Executive Director apply for a NPDES permit.[5]

5. The SFWMD and Wehle assert that the issuance of an injunction is unnecessary because the December 11 Order made clear that the SFWMD must have a NPDES permit for its backpumping operations, an issue that was previously unclear, and the SFWMD has every intention of complying with the law

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3. *Inclusion of Deadlines in Injunction*

Plaintiffs contend that the Court should place a specific time limit for compliance and for the issuance of the permit. Given anticipated complications in the permitting process, including, among other things, that there are no "off-the-shelf" templates that can be followed in fashioning an appropriate permit, the Court finds that the imposition of hard deadlines for issuance of the NPDES permit would be inappropriate in this case, and that an order requiring application for such a permit "forthwith" will adequately address Plaintiffs' claims.

B. Issuance of Interim Injunctive Relief

In their Remedies Brief, Plaintiffs assert that the Court should hold hearings regarding whether to order interim relief, which could include, *inter alia*, requiring: (1) the SFWMD and/or its Executive Director to report to the Court on backpumping episodes; (2) development of a new pumping protocol; (3) preparation of an analysis of the effect of the Bolles Canal expansion; (4) construction of additional in-city and on-farm on-site

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as interpreted by the Court. (*See SFWMD Remedies Br.* at 24-25). Having found that Plaintiffs are legally entitled to the issuance of an injunction, the remedy they sought in their complaints, the undersigned is not persuaded now by the argument that the Court should not enter an injunction because the SFWMD's Executive Director will voluntarily comply with the implications of the Court's interpretation of the CWA.

floodwater storage facilities; (5) application of the SFWMD's best management practices ("BMP") rule in the S-4 Basin; and (6) stormwater treatment area ("STA") construction or enlargement. (*See Pls. Remedies Br.* at 9-10). Intervenor-Plaintiff, the Tribe, additionally requests that the Court issue an order invalidating the Environmental Protection Agency's Proposed Rule regarding NPDES water transfers, *see* 71 Fed. Reg. 32887, a request the United States adamantly opposes on a number of bases. (*See Tribe Remedies Br.* [D.E. 654] at 16-19; *U.S. Remedies Br.* at 7-11).

Plaintiffs propose an extensive and lengthy process for the Court's consideration of these proposed interim remedies. That process would include the designation of experts, exchange of expert reports and rebuttal expert reports, mediation wherein the parties' experts would attempt to agree on appropriate interim relief, expert depositions, and an evidentiary hearing.

Defendants raise a number of challenges to Plaintiffs' requests for interim relief, including that Plaintiffs failed to put Defendants on notice of these requests in their complaints and failed to establish their entitlement to such interim relief at trial. Defendants also raise a number of legal arguments regarding the Court's authority to issue such interim relief. In addition, based on Plaintiffs' proposal for a lengthy remedies procedure, the SFWMD has renewed its Motion for Certification Under § 1292, urging that the Court enter a final declaratory judgment and allow the parties to take an interlocutory appeal of the December 11 Order.

Appendix C

The undersigned finds that the issuance of interim relief is premature, and perhaps academic at this time. By entering a Final Judgment that includes the permanent injunction that Plaintiffs sought from the inception of this case, the Court has resolved the case in a manner that allows the parties to immediately pursue their appeals of the Court's conclusion that the CWA requires the SFWMD to acquire a NPDES permit for its backpumping activities. That appeal would likely result in a stay of any interim relief the Court could order at the conclusion of the somewhat lengthy process Plaintiffs envision. Conducting further evidentiary hearings, which would require the parties to engage in additional discovery and would require the Court to resolve highly technical arguments regarding the environmental impact of the SFWMD's activities, could potentially result in the unnecessary expenditure of resources for both the judiciary and the parties. Should the Court's interpretation of the CWA be overturned on appeal, that expenditure of time and resources would have been in vain.

In entering a Final Judgment, the Court will retain jurisdiction to ensure compliance with the judgment, meaning that the Court will have jurisdiction to order interim remedies should this matter return to this Court following appeal. Plaintiffs' present requests for interim relief are therefore denied.

Appendix C

C. Joinder of DEP Secretary Mike Sole

In their Joint Motion for Joinder of Mike Sole, in his Official Capacity as Secretary of the Florida Department of Environmental Protection, as an InvoluntaryPlaintiff [D.E. 653], Plaintiffs and Intervenor-Plaintiff contend that the Court should join Mike Sole (the "DEP Secretary") as an involuntary plaintiff for purposes of the remedies phase of the proceedings to "ensur[e] that the defendant's NPDES permit applications . . . are promptly processed and issued and to facilitate consideration of the permitting agency's position on questions relating to interim remedies." (*Mot.* [D.E. 653] at 1-2).

Setting aside the issues of whether such a joinder would be feasible under the Federal Rules of Civil Procedure, the undersigned agrees with Defendants and Intervenor-Defendant, United States, that such joinder would be premature at this time because there is no evidence that the DEP Secretary or the Florida Department of Environmental Protection will attempt to delay issuance of a permit to the SFWMD. Should such a delay occur or should another reason for joinder arise, Plaintiffs may renew their motion.

D. Dismissal of the SFWMD

In their brief regarding remedies, the SFWMD and Wehle request that the SFWMD be dismissed from this action on the basis of the sovereign immunity that the undersigned found it enjoys from this suit. The request is appropriate and is granted.

Appendix C

III. *CONCLUSION*

Based on the foregoing, it is

ORDERED AND ADJUDGED as follows:

(1) Plaintiffs' request that the Court issue an injunction requiring the SFWMD's Executive Director to apply for a NPDES permit forthwith is **GRANTED**. The injunction shall be issued in a separate Final Judgment, which shall be immediately appealable. The Court will retain jurisdiction over the parties, including to the extent allowable while any appeal is pending, to ensure compliance with the judgment.

(2) Plaintiffs' request for interim injunctive relief is **DENIED** for the reasons set forth above.

(3) Plaintiffs and Plaintiff-Intervenor's Joint Motion for Joinder of Mike Sole, in his Official Capacity as Secretary of the Florida Department of Environmental Protection, as an Involuntary Plaintiff **[D.E. 653]** is **DENIED**.

(4) U.S. Sugar's Motion to Strike Plaintiffs' Exhibits to Plaintiffs' Memorandum on Injunctive Relief and Remedies **[D.E. 665]** is **DENIED AS MOOT**.

(5) The SFWMD's Motion for Certification Under § 1292(b) **[D.E. 689]** is **DENIED AS MOOT**.

(6) Defendants' Motion to Strike and, in the Alternative, Response to Requests to Clarify and Reconsider Eleventh Amendment Issues [**D.E. 691**], filed on June 14, 2007, is **DENIED**.

(7) Plaintiffs' claims against Defendant, the SFWMD, are **DISMISSED**. The Executive Director of the SFWMD shall remain as a party to this action.

(8) The Clerk of the Court is instructed to **CLOSE** the case. Any pending motions not otherwise ruled upon are **DENIED AS MOOT.**

DONE AND ORDERED in Chambers at Miami, Florida, this 14th day of June, 2007.

s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, DATED AND FILED DECEMBER 11, 2006, SETTING FORTH FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA MIAMI DIVISION

CASE NO. 02-80309-CIV-ALTONAGA/Turnoff

FRIENDS OF THE EVERGLADES, INC., *et al.*,

Plaintiffs,

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, *et al.*,

Defendants.

ORDER SETTING FORTH FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came before the Court for a non-jury trial beginning on January 9, 2006 and ending on April 19, 2006. The Court heard testimony from over 20 witnesses, and approximately 165 exhibits were entered into evidence.

Appendix D

I. BACKGROUND

Plaintiffs, Friends of the Everglades ("FOE") and Fishermen Against Destruction of the Environment ("FADE"), filed suit against the South Florida Water Management District ("SFWMD") on April 8, 2002. FOE, an organization of over 6,000 members, was formed by Marjory Stoneman Douglas to preserve and protect the Everglades. (*Comp.* [D.E.1] at 2). FADE was founded by a group of fishermen and conscientious conservationists concerned about the degradation of Lake Okeechobee. (*See id.* at 3). The SFWMD is an independent, special district of the State of Florida charged with the operation and maintenance of certain pump stations that pump water into Lake Okeechobee. (*See id.* at 4).

The Complaint sought an order requiring the SFWMD to obtain a National Pollution Discharge Elimination System ("NPDES") permit under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, before the SFWMD could discharge water containing pollutants into Lake Okeechobeeby means of the S-2, S-3, and S-4 pump stations. Jurisdiction was based on the "citizen suits" provision of the CWA, 33 U.S.C. § 1365(a),[1] and

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1. Section 1365(a) provides, in part, that

> any citizen may commence a civil action on his own behalf —
>
> (1) against any person (including (i) the United States, and (ii) any other governmental

(Cont'd)

federal question jurisdiction under 28 U.S.C. § 1331. The case was consolidated with *Florida Wildlife Federation v. So. Florida Water Mgmt. Dist.*, Case No. 02-80918-Civ (*see Dec. 9, 2002 Order* [D.E. 39]), and the latter case was accordingly closed. The Florida Wildlife Federation ("FWF") is a statewide non-profit conservation and education organization with a mission of preserving, managing, and improving the water resources and fish and wildlife habitat of Florida. (*Comp.* [D.E. 1 in 02-80918-Civ] at 3).

The City of South Bay, Florida, and United States Sugar Corporation ("U.S. Sugar") were granted permission to intervene as Defendants in an order dated October 2, 2002. [D.E. 23].[2] In support of intervention,

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(Cont'd)

> instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, . . . to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

2. The undersigned subsequently granted the City of South Bay, Florida's Motion to Withdraw. [D.E. 212].

U.S. Sugar asserted that it has substantial sugar cane growing and harvesting operations in the S-2 and S-3 drainage basins served by the pump stations at issue, that it has property interests in the crops, that operation of the pump stations prevents its crops from being flooded and destroyed, that issuance of the requested NPDES permits for previously unregulated structures could cause U.S. Sugar to lose a statutory entitlement for an agricultural exemption from NPDES permitting, and that, in short, any decision requiring the SFWMD to obtain a NPDES permit would be devastating for U.S. Sugar's operations. (*See Mem. in Supp. of Mot. to Intervene* [D.E. 18] at 2-3).

The Miccosukee Tribe of Indians of Florida ("Miccosukee") was granted leave to intervene as a Plaintiff in an order dated December 9, 2002. [D.E. 40]. In support of intervention, Miccosukee maintained that backpumping of pollutant-laden waters by the SFWMD into Lake Okeechobee threatened Miccosukee's way of life in the Everglades and Lake Okeechobee, and that the destruction infringed on Miccosukee's ability to practice its religion and on its traditional bases of subsistence, commercial activities, and natural resources. (*Mot. to Intervene* [D.E. 24] at 4).

Much later, on May 2, 2005, the United States of America, on behalf of the United States Army Corps of Engineers ("Corps") and the United States Environmental Protection Agency ("EPA"), was granted permission to intervene as a Defendant. [D.E. 263]. The United States maintained it had a compelling interest

in the litigation because for decades the Corps had been building a comprehensive network of levees, water storage areas, pumps and canal improvements in South Florida, and the S-2, S-3, and S-4 pump stations were part of the Central and South Florida Project. As for the EPA, that agency administers the NPDES permitting program in conjunction with the states, including Florida, that have assumed responsibility for issuing permits within their borders under 33 U.S.C. § 1342. (*See* [D.E. 198] at 1-2).

On May 12, 2003, the case was reassigned to the docket of the undersigned. [D.E. 77]. After the Supreme Court accepted certiorari in yet another related case styled *So. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, Case No. 98-6056-Civ (*"S-9 Case"*), all proceedings were stayed by order dated July 1, 2003. [D.E. 147]. On January 21, 2005, after the Supreme Court entered its decision in the *S-9 Case*,[3] the Court granted the SFWMD's Motion to Reopen the Case. [D.E. 179].

The pleadings have been amended several times by all parties since the inception of the litigation. Miccosukee's Second Amended Complaint, filed on February 22, 2005, among other things, added as a named Defendant Henry Dean, Executive Director of the SFWMD, in his official capacity. [D.E. 188].

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3. *See So. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

Appendix D

Plaintiffs seek the following relief: (1) a judgment declaring that the SFWMD (and its representatives) has violated, and is in continuing violation of, the Clean Water Act, 33 U.S.C. § 1251 *et seq.*; (2) an order enjoining the SFWMD from continuing to violate the CWA; (3) an injunction requiring the SFWMD (and its representatives) to obtain a NPDES permit for its backpumping activities at the S-2, S-3, and S-4 pump stations; (4) an order requiring the SFWMD to provide Plaintiffs with a copy of all reports it submits to the state or federal government concerning the discharge of water to Lake Okeechobee (the "Lake");[4] and (5) an award of attorney's fees and costs. No affirmative relief is sought against Intervenor-Defendants, U.S. Sugar. An issue raised by the SFWMD consistently in its pleadings is its defense of sovereign immunity.

The undersigned denied the parties' cross-motions for summary judgment in an order dated November 23, 2005 [D.E. 527], and the trial followed. During and after the trial, the undersigned reviewed the evidence admitted, and considered all applicable law and arguments presented by counsel. The following findings of fact and conclusions of law are therefore made pursuant to the requirements of Rule 52 of the Federal Rules of Civil Procedure.

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4. FWF has not specifically requested the furnishing of such reports.

Appendix D

II. FINDINGS OF FACT

A. Historical Description of Lake Okeechobee and the Everglades

The landscape of South Florida today is markedly different from that which existed prior to the extensive settlement and development the area has experienced since the late 19th century. The Court's analysis begins with a description of the area as it existed prior to development efforts. The description focuses primarily upon the southern portion of Lake Okeechobee and the northern portion of the Everglades. Today this combined area is known as the Everglades Agricultural Area ("EAA").

Lake Okeechobee has been referred to at various times throughout recorded history as Laguna Del Espiritu Santo (1763), Lak du St. Esprit (1780), Lake Mayacoo (1835), and Lake O-Kee-Cho-Bee(1839, 1856). (*See Trial Tr. Feb. 14*, 58:22-59:8, 60:17-20, 63:6-18, 65:3-66:14). To the south of Lake Okeechobee (in the area now known as the EAA and, further south, the Everglades) was an immense and vast wetland referred to by Native Americans as "grassy water." (*See Joint Pretrial Stip.* [D.E. 536], Attach. 5B ¶ 6). The "grassy water" area encompassed some three million acres. (*See id.*). Today, the Everglades is less than half of its pre-drainage size. (*See id.*, ¶ 48). Prior to extensive drainage operations, Lake Okeechobee had higher

water levels and extended further south and west than it does today. (*Id.*, ¶ 39).[5]

Maps, surveys, and accounts of the natural conditions of the southern rim of the Lake describe a sandy-bottomed lake with water grasses growing in the shallows. (*Plain. Ex. 60*, p. 66; *Plain. Ex. 57*). The Lake bed rose to a muck rim covered with custard apple trees, (*Trial Tr. Jan. 9, 2006*, 163:21-25, 165:10-24), followed by a slow downward gradient to the south through the Everglades. (*Trial Tr. Jan. 9, 2006*, 189:8-18). Short tributary rivers flowed from the Lake's southern forested rim. (*Plain. Ex. 60*, pp. 69-73). Accounts survive of parties navigating the tributary rivers extending from the southern shore of the Lake. (*See Trial Tr. Feb. 14, 2006*, 68:21-69:5; *Plain. Ex. 60*).

Lake Okeechobee appears as a dominant feature on maps of Florida dating back at least 250 years. (*Trial Tr. Feb. 14, 2006*, 58:22-25; *see also Def. Ex. 75*, p. 6). Beginning in the eighteenth century, there were various attempts to map the area of South Florida. Although many features of the maps changed over time as map-making techniques and knowledge of the area improved, the maps consistently showed two separate features — a very large lake bordered on the south by a vast

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5. The surface waters of the Lake historically encompassed the area that today contains the Herbert Hoover Dike, which presently surrounds the Lake, and the S-2, S-3, and S-4 pump stations, the stations at issue in this litigation. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 35; *Trial Tr. Jan. 9, 2006*, 191:13-18, 211:12-20; *Trial Tr. Jan. 18, 2006*, 104:11-18).

wetland. (*See Trial Tr. Jan. 9, 2006*, 157:10-168:21; *Trial Tr. Feb 14, 2006*, 58:12-66:11; *Plain. Exs. 16A, 16B, 220*). In other words, all recorded maps show some boundary between Lake Okeechobee and the area currently known as the EAA. (*See id.*).

The southern shoreline of the Lake was surveyed by J. M. Kreamer in 1892 (*Plain. Ex. 220*), and by John W. Newman in 1910. (*Def. Ex. 16D*). It was officially surveyed by the State of Florida from 1914-17 (the "F. C. Elliot Survey"). (*Plain. Ex. 55*). The conclusions of the F.C. Elliot Survey are referenced in a case that required the court to determine the historical boundary between the Lake and the marshlands to the south of the Lake. (*See Plain Ex. 57*). On a related note, an account written in the newspaper *New Orleans Democrat* in 1870 references an exploring party making camp on the southern shore of Lake Okeechobee, further suggesting that the Lake, at least at times, had a distinguishable southern shoreline. (*Plain. Ex. 60*, p. 70).

Finally, photographs of the Lake Okeechobee shoreline taken from the cupola of the Bolles Hotel in April 1912 were entered into evidence.[6] (*Plain. Exs. 16E1, 16E2, 16E3*). These photographs depict a custard apple forest along a dry southern shoreline. (*See Trial Tr. Jan. 9, 2006*, 170:16-174:14; *Plain. Exs. 16E1, 16E2, 16E3*).

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6. The Bolles Hotel was located on the southern shore of Lake Okeechobee on the western bank of the Rita River. (*See Trial Tr. Jan. 9, 2006*, 167:24-169:12). Its location is shown on the Newman Survey of 1910. (*See Plain. Ex. 16D*). It was constructed by Richard Bolles, an early Everglades land speculator. (*Trial Tr. Jan. 9, 2006*, 169:8-12).

Notwithstanding these early maps, accounts and photographs, the shoreline was not as well-defined as Plaintiffs contend. Lieutenant J.C. Ives, for example, described the Lake as covering nearly 1,200 square miles, nearly double the current size of the Lake. (*See Def. Ex. 206*, p. 38). Moreover, he observed that "[f]rom Cypress Point around toward the south and south-west, the shore is much less clearly defined. The Everglades form the general boundary, but no distinct line marks the division between this region and the surface of the lake; the southern portion of the latter being much grown up with grass [sic]." (*Id.*).[7] Similarly, a report of the Board of Commissioners of the Okeechobee Flood Control District noted that historically "the south shore of the Lake was not clearly defined being low, irregular and swampy." (*Def. Ex. 213*, p. 12).

Moreover, there was evidence adduced at trial that the 1912 Bolles Hotel photograph, the most convincing evidence of a well-defined southern shoreline, was taken during the annual dry season, when the Lake typically contracts. (*See Trial Tr. Feb. 10, 2006*, 90:4-7). Additional evidence suggests that the area was experiencing a drought during the period in question. (*See id.*, 90:8-12, 91:7-10). Finally, the photographs were taken after 20 years of drainage operations and thus do not provide a truly accurate depiction of the Lake and the EAA in

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7. Ives' memoir acknowledges that the short time in which the map was compiled "precluded anything like a thorough investigation as to what is now known in the region in question." (*Def. Ex. 206*, p. 6).

their natural states. (*See id.*, 89:21-25; *Trial Tr. Feb. 13, 2006*, 17:20-23).

That the historical accounts of the southern shoreline are inconsistent is not surprising. The size of Lake Okeechobee varied significantly depending upon meteorological conditions within its watershed. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 38; *Trial Tr. Jan. 13, 2006*, 52:18-23; *Trial Tr. Jan. 18, 2006*, 104:3-5; *Trial Tr. Jan. 19, 2006*, 16:20-23; *Def. Ex. 206*, pp. 6-7). The characteristics of the Lake and the Everglades varied seasonally, decadally and otherwise, through extreme cycles of flooding and drought. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 38; *Def. Ex. 206*, p. 7). Even today, Lake Okeechobee periodically recedes within the boundary established by the Herbert Hoover Dike ("Dike"), which extends around the rim of the Lake. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 40; *Trial Tr. Feb. 14, 2006*, 78:1-24).

The undersigned concludes that, historically, observable distinctions existed between Lake Okeechobee and the vast wetlands to the south of the Lake. A contrary conclusion would fly in the face of the evidence presented. However, the precise point or points dividing the Lake's surface waters from the wetlands to the south varied drastically depending upon numerous conditions, explaining, at least in part, the inconsistent accounts of the area that have survived.

Appendix D

B. Development of the Everglades

1. *Early Development*

Beginning in the mid 1800s, the State of Florida embarked upon legislative efforts to encourage development of the Everglades ecosystem, focusing its efforts on draining the area to increase its marketability and habitability. (*See Trial Tr. Jan. 13, 2006*, 57:9-13; *Trial Tr. Feb. 8, 2006*, 204:11-16). Land reclamation was the single-minded purpose behind the efforts. (*See Trial Tr. Feb. 10, 2006*, 94:17-95:4, 95:20-23).

To further the drainage activities, canals were constructed connecting the Lake to the Gulf of Mexico. (*Joint Pretrial Stip.*, Attach. 5B ¶ 10).[8] The overarching goal of the canal construction was to move water from Lake Okeechobee to tidal waters. (*See id.*). The theory was that if Lake Okeechobee could be drained, then the Everglades would eventually dry out. (*See Joint Pretrial Stip.*, Attach. 5B ¶¶ 9, 10; *Def. Ex. 203*, pp. 56, 65).

By 1912, construction had begun on three major canals, the North New River, Hillsboro, and Miami Canals. (*See Joint Pretrial Stip.*, Attach. 5A ¶ 10). The

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8. Two canals were constructed in the 1880s. One canal, named the 3 Mile Canal, connected Lake Okeechobee to Lake Hickpochee. (*Trial Tr. Feb. 13, 2006*, 16:20-23). The other canal, located in the area of the present Miami Canal, extended approximately nine to ten miles into the Everglades from the Lake. (*Id.*, 16:24-17:1).

canals were connected to the Atlantic Ocean by April 1917. (*See Trial Tr. Jan. 18, 2006*, 107:3-5). The purposes of constructing the canals were to lower the elevation of the Lake, drain the rich muck soils south and east of the Lake, and to foster navigation. (*See Joint Pretrial Stip.*, Attach. 5A ¶¶ 10, 19). To further the effort, the Everglades Drainage District (established in 1913) constructed hundreds of miles of small drainage canals throughout the Everglades. (*See id.*, Attach. 5B ¶¶ 10, 12).

The early private and public drainage canals were incapable of controlling flooding. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 13). Problems with flooding reached an apex in 1926 and 1928, when hurricanes killed over 2,500 people living in towns just south of Lake Okeechobee. (*See id.; Trial Tr. Feb. 10, 2006*, 95:12-15; *Def. Ex. 213*, p. 7; *Def. Ex. 203*, pp. 8-9). Congress responded to the hurricanes of the 1920s by authorizing construction of the Dike. (*See Trial Tr. Feb. 8, 2006*, 204:21-23). The initial authorization contemplated building a substantial dike system on the southern shore of Lake Okeechobee and a smaller dike system on the northern shore of the Lake. (*See id.*, 204:23-205:1). By 1937, construction along the southern shore was substantially completed. (*See id.*, 205:2-5).

The Dike, however, proved incapable of adequately controlling flooding. Hurricanes in the 1940s caused Lake waters to overflow the newly constructed Dike, flooding the surrounding areas and severely damaging the Dike in the process. (*See Trial Tr. Jan. 13, 2006*,

59:12-19; *Trial Tr. Feb. 8, 2006*, 205:6-10). In 1947 and 1948, ninety percent of southeastern Florida, from Orlando to the Keys, was flooded. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 13). Indeed, after the 1947 hurricane, there were reports of many Florida residents being forced to live on the second floors of their homes for up to nine months. (*Trial Tr. Jan. 13, 2006*, 59:15-16).

In addition to the flooding problems, the drainage of Lake Okeechobee and the Everglades produced other unintended consequences. When the areas surrounding Lake Okeechobee were drained, the soils dried out and thousands of acres of land were destroyed by fires. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 14). The fires caused loss of soil material that had taken hundreds or thousands of years to accrete. (*Trial Tr. Jan. 19, 2006*, 169:5-7). Fires dirtied the air to such an extent that health warnings were issued in Dade County.[9] (*Trial Tr. Feb. 10, 2006*, 112:13-15).

Uncontrolled drainage caused additional problems through the lowering of the water table. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 11). The lowered water table allowed the ocean saltwater to intrude in areas where fresh water had previously been. (*See id.*; *Trial Tr. Jan. 20, 2006*, 96:16-97:5). Saltwater intrusion contributed to the destruction of well fields and lands along the east coast of Florida. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 11).

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9. Dade County has since been renamed Miami-Dade County.

2. *C&SF Project*

In the 1930s, the State developed a comprehensive plan for flood control and water supply, known as the "re-watering plan." The plan dedicated the northern portion of the Everglades (what has become known as the EAA) for reclamation, and dedicated the southern portion of the Everglades (what have become the Water Conservation Areas) for water supply and storage to protect and provide water supply to the lower east coast of Florida, from West Palm Beach to Homestead. (*See Trial Tr. Jan. 20, 2006*, 114:13-115:18). As concerns arose over the health of the Everglades and the inability of the "re-watering plan" to address the problems, the Central and South Florida Project for Flood Control and Other Purposes ("C&SF Project" or the "Project") was adopted. (*See Joint Pretrial Stip.*, Attach. 5A ¶ 37). Congress authorized the C&SF Project in 1948.[10] (*See id.*, Attach. 5B ¶ 15; *Trial Tr. Jan. 13, 2006*, 60:2-3, 14-16; *Trial Tr. Jan. 18, 2006*, 80:17-19; *Def. Exs. 1, 205*).

The C&SF Project is a multi-purpose project that provides flood control; water supply for municipal, industrial, and agricultural uses; water supply for the Everglades National Park; protection from saltwater intrusion; and protection of fish and wildlife resources.[11]

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10. For a variety of reasons, several components of the C&SF Project that were originally planned have not been constructed. (*See Trial Tr. Jan. 20, 2006*, 101:1-9).

11. Congress stated the purposes of the C&SF Project, in relevant part, as follows:

(Cont'd)

Appendix D

(*See Joint Pretrial Stip.*, Attach. 5B ¶ 17; *Trial Tr. Jan. 13, 2006*, 149:23-150:23; *Trial Tr. Jan. 18, 2006*, 80:10-15; *Def. Ex. 232*, p. i; *Def. Ex. 205*, pp. 2-3, 50). Waste disposal is not one of the designated purposes of the C&SF Project. (*See Trial Tr. Jan. 13, 2006*, 150:24-153:3; *Trial Tr. Jan. 20, 2006*, 118:20-25)).[12]

The C&SF Project covers an area of approximately 12,000 square miles. (*See Trial Tr. Jan. 18, 2006*, 80:6-7). Water is managed through the use of water control

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(Cont'd)

> *Construction program.* The comprehensive plan is a long-range plan for the control and use of water resources of most of central and southern Florida.
>
> * * *
>
> The flood problems of central and southern Florida are closely interrelated with the development of water and land resources of the entire area; this report therefore considers all related problems of water control and use.
>
> * * *
>
> A long-range plan of this kind for flood protection and water quality is urgently needed now, so that development of the region can proceed in an orderly manner which will preserve its resources of water and land for future generations.

(*Def. Ex. 205*, pp. 14, 45, 58).

12. The water moved through C&SF structures, however, contains waste products. (*See Trial Tr. Jan. 13, 2006*, 162:16-163:12).

structures including the Dike, levees, canals, spillways, culverts, pump stations and other water diversion facilities. (*Joint Pretrial Stip.*, Attach. 5B ¶ 20).[13] These water control structures were designed and developed along general watershed basin concepts. (*Trial Tr. Jan. 25, 2006*, 23:10-14). The C&SF Project is responsible for moving billions of gallons of water daily. (*Joint Pretrial Stip.*, Attach. 5B ¶ 24).

The SFWMD pump stations are flow diversion facilities, the purpose of which is to change the movement, flow and circulation of waters. (*Trial Tr. Jan. 20, 2006*, 110:12-22). As the local sponsor for the C&SF Project, the SFWMD is responsible for operating and maintaining most of the Project's structures, including the S-2, S-3, and S-4 pump stations at issue in this case. (*Trial Tr. Jan. 19, 2006*, 78:14-19). However, in operating the structures, there is a tremendous amount of coordination between the Corps and the SFWMD. (*See Trial Tr. Jan. 18, 2006*, 85:5-11).[14]

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13. The system is comprised of over 1,000 miles of canals, over 1,000 miles of levees, approximately 150 structures and 15-30 major pump stations. (*See Trial Tr. Jan. 13, 2006*, 61:16-19).

14. The Corps developed the water control plan for the operation of the C&SF system. The water control plan contains information governing the regulation of the lakes and reservoirs in the system and contains operating criteria for the structures and canals within the system. (*See Trial Tr. Jan. 18, 2006*, 83:1-84:1; *see also Def. Exs. 215-18*).

Appendix D

The C&SF Project has successfully reclaimed much of the land in South Florida. (*Joint Pretrial Stip.*, Attach. 5B ¶ 25). Today, millions of people live within the flood plain of the Everglades ecosystem,[15] which would not be possible without the flood protection and stable water supply provided by the C&SF Project. (*Id.*).

C. Current Description of Lake Okeechobee and the Surrounding Areas

1. *Lake Okeechobee*

The efforts to develop South Florida had a profound effect on the Lake and the Everglades. The present ecosystem scarcely resembles the natural system.

Lake Okeechobee, a large shallow lake, remains the central feature of the Everglades ecosystem and is recognized as its liquid heart. (*Joint Pretrial Stip.*, Attach. 5B ¶ 30). The Lake is a key component of the South Florida Kissimmee-Okeechobee-Everglades surface water hydrologic and ecological system. (*See id.*, Attach. 5A ¶ 63). The system begins in Central Florida near Orlando, extends southward through the Kissimmee Chain of Lakes, the Kissimmee River, and Lake Okeechobee, and continues southward through the Everglades into Florida Bay. (*Id.*, Attach. 5A ¶ 63). The ecosystem is an immense, integrated system of

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15. Indeed, in the early 20th century, vast amounts of what is now downtown Miami remained under several feet of water. (*Trial Tr. Jan. 19, 2006*, 184:5-21).

connected surface and ground waters that covers over 15,000 square miles. (*Id.*, Attach. 5B ¶ 5).

Lake Okeechobee spans an area of approximately 730 square miles and has an average lake-wide depth of nine feet. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 40; *Trial Tr. Jan. 18, 2006*, 103:23-24; *Plain Ex. 20*, p. 2). It is the largest body of fresh water in the southeastern United States and the second largest freshwater lake within the continental United States. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 30). The parties have stipulated that the Lake is a navigable water (*see id.*, Attach. 5A ¶ 5), as that term is defined in the CWA and its regulations. *See* 33 U.S.C. § 1362(7); 40 C.F.R. § 230.3(s); 33 C.F.R. § 328.3(a).

Lake Okeechobee is divided into six regions. The "pelagic" region is characterized by open water and a muddy or sandy bottom. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 44). Two near-shore regions (north and south), contain a high density of submerged plants when water levels in the Lake are low and periodic algal blooms when water levels are high. (*Id.*). Three littoral regions,[16] located in the northern and southern portions of the Lake and at Fisheating Bay, contain their own unique vegetation structures and water quality. (*Id.*). Significant chemical, physical and biological differences

16. A littoral region is defined as an area in which the bottom of a lake is covered by macrophytes (plants that are visible). (*See Trial Tr. Jan. 9, 2006*, 83:13-25).

exist between each Lake region and even within each region. (*See id.*, ¶ 46).

The Lake has several hydrological and ecological functions. It functions as a reservoir to collect and supply water to the urban, agricultural and natural systems throughout the southern Florida peninsula. It provides flood protection while serving as a multimillion dollar sport and commercial fishery. It also provides a habitat for wading birds, migratory waterfowl, and the federally endangered Everglades Snail Kite. (*Joint Pretrial Stip.*, Attach. 5B ¶ 33).

As noted, Lake Okeechobee functions, in part, as a reservoir. The goal of any reservoir "is to store excess water from times when you don't need it and to release it during periods when you do." (*Trial Tr. Jan. 20, 2006*, 73:22-24). In order to carry out its storage functions, the water level of the Lake is generally brought to its lowest point at the end of May, creating excess storage capacity that may be utilized for flood control purposes during the rainy season. (*See id.*, 72:14-73:2). The water levels in the Lake are permitted to rise during the rainy season and the excess water is made available to different users for a variety of purposes. (*See id.*, 72:23-73:2). Beyond using the waters for agricultural and/or municipal purposes, the ability to store and later release the water is critical to avoiding saltwater incursions onto the land. (*See id.*, 97:6-24).

Virtually the entire Lake is enclosed by the Dike, a 27 to 42-foot high, and up to 300-foot wide barrier that

physically separates the Lake from the lands surrounding the Lake. (*Trial Tr. Jan. 13, 2006*, 75:1-2; *Trial Tr. Feb. 9, 2006*, 21:9-24). A portion of the Dike was built within the shoreline of the historical Lake. (*Trial Tr. Jan. 18, 2006*, 103:21-23; *see also Trial Tr. Jan. 10, 2006*, 142:1-6). The Dike is made of a soil matrix.[17] (*See Joint Pretrial Stip.*, Attach. 5B ¶¶ 33, 34; *Trial Tr. Feb. 8, 2006*, 206:5-7, 207:21-25). It prevents the Lake from expanding and contracting as it would under natural conditions. (*See Trial Tr. Jan. 25, 2006*, 46:14-17). The Dike serves as a dual functioning dam, providing water storage in Lake Okeechobee and protecting the surrounding communities from flooding. (*Joint Pretrial Stip.*, Attach. 5B ¶ 34).

A rim canal surrounds the southern inner edge of Lake Okeechobee. (*Trial Tr. Jan. 9, 2006*, 120:12-16). In most places, the rim canal is directly adjacent to the Dike. (*Trial Tr. Jan. 10, 2006*, 82:14-15). The rim canal was dug out to provide material for construction of the Dike. (*Trial Tr. Jan. 9, 2006*, 120:17-19). The S-2 and S-3 pump stations pump water directly from the canals into the rim canal. (*Trial Tr. Jan. 10, 2006*, 82:16-17).

A series of canals[18] have been constructed that intersect the Dike at the southern end of the Lake. The

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17. The Dike consists of a number of materials, including sands, shells, limestone, limestone fragments, silts, and peat. (*Trial Tr. Feb. 8, 2006*, 207:21-25). Most of the materials of which the Dike is composed were hydraulically dredged from the area. (*Id.*, 206:6-11).

18. The parties have stipulated that the EAA canals are navigable waters. (*See Joint Pretrial Stip.*, Attach. 5A ¶ 11).

largest canals, the North New River, Hillsboro and Miami Canals, extend through several basins, from the southern side of Lake Okeechobee through the EAA, the Water Conservation Areas, the lower east coast communities or the remnant Everglades, and ultimately to the bays and ocean. (*Joint Pretrial Stip.*, Attach. 5B ¶ 22; *Def. Ex. 1*). Smaller canals manage more local waters. The C-20 Canal, for example, is used to manage the waters of the S-4 basin, a basin that includes the City of Clewiston and the surrounding agricultural lands. (*Id.*, ¶ 23).

In all, there are approximately 43 structures that intersect the Dike, allowing water to flow into and/or out of the Lake. (*See Trial Tr. Jan. 18, 2006*, 92:7-9). There are 19 points that allow outflow from the Lake (five represent primary outflow points and 14 also allow inflow). (*See id.*, 92:20-93:1, 93:2-6). Fisheating Creek is the only uncontrolled inflow source to the Lake. (*See id.*, 93:11-18). The Lake has no uncontrolled outflow points. (*See id.*, 93:25-94:1). It is beyond dispute that the natural storage capacity of the Lake basin has been lost as a result of the man-made modifications to the system. (*See Trial Tr. Jan. 26, 2006*, 20:2-4, 22:3-16).

2. *The EAA*

Parts of Lake Okeechobee's original lakebed — separated from the Lake by the Dike — and portions of the northern Everglades marshes, were designated by the C&SF Project as the EAA, which was to be reclaimed for public and private land uses. (*Joint Pretrial Stip.*,

Attach. 5B ¶ 36). The EAA comprises 630,000 acres between the southern boundary of the Dike and the northern boundaries of the Water Conservation Areas. (*See id.*, ¶ 37). The EAA is a highly productive agricultural region extending from the south shore of Lake Okeechobee to the northern levees of the conservation areas (of the Everglades). The Lake supplies irrigation water to the EAA. (*Joint Pretrial Stip.*, Attach. 5A ¶ 43). The EAA communities and land uses were, and are, fully dependent upon the Lake for their water supply and flood control. (*See id.*, ¶¶ 43, 53).

Muck soils predominate in the EAA. Prior to drainage operations, materials were deposited in the waters; those materials were, in turn, absorbed by the soil. (*See Trial Tr. Jan. 9, 2006*, 45:11-16).

> The soils of the Everglades were formed under wetland conditions. The water that covered the soil surface much of the year greatly reduced oxygen availability to microorganisms that derive their energy by oxidated decomposition of carbon compounds. Organic matter accumulated faster than it decomposed forming the Everglades Histosols. When the area was drained for settlement and agricultural use, oxygen permeated the soil mass, decomposition accelerated, and the organic matter began to decompose faster than it accumulated. This

> caused the surface elevation to fall, a phenomenon known as subsidence.

(*Plain. Ex. 128*, pp. 37-38). The muck soils are naturally very high in phosphorous. (*See Trial Tr. Feb. 10, 2006*, 61:3-15).

D. Water Flow in the Everglades

Today, almost all water flow in the Everglades is through man-made conveyance structures. Given that the system has been significantly modified from its natural state, it is important to distinguish between the flow of water today, flow that is primarily regulated by the SFWMD (along with the Corps), and the natural flow of water through the system.

1. *Natural Water Flow*

Historically, Lake Okeechobee's surface water, subsurface flow, and localized rainfall supplied water for the Everglades. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 7). In its natural state, the Everglades was a unified hydrologic system. (*See, e.g., Trial Tr. Jan. 9, 2006*, 208:16-209:5; *Trial Tr. Jan. 10, 2006*, 140:15-141:4; *Trial Tr. Jan. 11, 2006*, 75:5-18; *Trial Tr. Feb. 8, 2006*, 203:25-204:7; *Trial Tr. Feb. 10, 2006*, 78:22-79:6, 81:8-22, 94:3-7; *Def. Ex. 207*, p. 21). Water moved freely between surface and ground water. (*See Trial Tr. Feb. 10, 2006*, 82:6-16).

Prior to the man-made modifications to the system, water generally flowed slowly south, over the flat South

Florida landscape to the sea.[19] (*See Joint Pretrial Stip.*, Attach. 5A ¶ 7). Land to the south of the Lake slopes very slightly to the south. (*See Trial Tr. Jan. 19, 2006*, 177:4-10). In fact, the slope is far flatter than the slope of a sidewalk. (*See id.*, 177:11-19). Due to the nearly flat slope of the land, water flowed south at an exceedingly slow pace. (*Id.*, 178:5-12). This historic water flow is depicted on a United States Geological Survey map that was introduced into evidence (the map was made using SFWMD data). (*Plain. Ex. 58; see also Trial Tr. Jan. 19, 2006*, 34:17-36:25).

Historically, the water of the Lake would rise until it overtopped a natural muck berm along the southern shoreline, and then it would spill into the vast marsh known as the Everglades. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 47a; *see also Trial Tr. Jan. 13, 2006*, 51:13-17). Water in the Lake would overcome the levy when the Lake reached an elevation of 21.5 feet. (*Trial Tr. Jan. 9, 2006*, 208:25-209:5). During the rainy season, water from Lake Okeechobee would flow in a gradual

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19. When the Miami Canal was first dredged across the Everglades from its entrance at the Rita River to the headwaters of the Miami River, a navigation lock was constructed in the canal just a short distance south of the southern shore of Lake Okeechobee. (*See Trial Tr. Jan. 9, 2006*, 182:8-189:1; *Plain. Exs. 16F, 16G*). A photograph of the lock shows the doors opening to the north. (*See Trial Tr. Jan. 9, 2006*, 186:7-14; *Plain. Exs. 16G, 42, 46*). Lock doors are designed to open against the direction of flow (*see Plain. Exs. 42, 46*), confirming that the direction of flow in the Miami Canal was generally from the north to the south. (*See Trial Tr. Jan. 9, 2006*, 186:11-14; *Plain. Exs. 16G, 42, 46*).

sheet through the Everglades to Florida Bay.[20] (*See id.; Trial Tr. Feb. 10, 2006*, 81:18-19). Occasionally (during some years) the water would flow across the coastal ridge to the Atlantic Ocean. (*Trial Tr. Jan. 13, 2006*, 51:18-22).

Localized events such as wind or rainfall could affect the general southward flow of water over short periods of time. (*Trial Tr. Jan. 19, 2006*, 178:13-179:6). In other words, the southward flow, at least historically, was intermittent. (*See id.*, 180:7-18). During severe windstorms, hurricanes or other meteorological events, water could flow north from the Everglades to the Lake. (*See, e.g., Trial Tr. Jan. 9, 2006*, 193:4-20; *Trial Tr. Jan. 10, 2006*, 156:22-158:16; *see also Plain. Ex. 16C*, p. 3; *Def. Ex. 302*, ¶ 7). There are historic accounts of people observing wind and water conditions causing water to flow in this direction. (*See Trial Tr. Jan. 9, 2006*, 212:2-18, 216:6-25). Water was also capable of seeping through the porous soil matrix of the Everglades in both directions, *i.e.*, from the Lake to the Everglades and from the Everglades to the Lake. (*See Trial Tr. Jan. 13, 2006*, 53:10-13; *Trial Tr. Feb. 10, 2006*, 81:13-17).

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20. "Florida Bay is a shallow inner-shelf lagoon located at the southern end of the south Florida watershed. It is an area where fresh water from the Everglades mixes with the salty waters from the Gulf of Mexico to form an estuary that is surrounded by mangrove forests and encompasses over 200 mangrove islands." The Florida Bay Education Project, http://www.floridabay.org/intro.shtml.

Appendix D

2. *Water Flow Today*

a. Surface Water Flows Generally

Most water flows today are regulated. As a managed system, the natural flow of water has been replaced by a series of man-made structures, and water is now routed through a very complex series of conveyance systems. (*See Trial Tr. Jan. 26, 2006*, 20:1-6). The waters are managed as a whole. (*Joint Pretrial Stip.*, Attach. 5B ¶ 21).

Navigable waters in the C&SF canals and waters in the Lake certainly intermingle, whether by natural or man-made forces. (*Trial Tr. Jan. 12, 2006*, 88:23-89:17). For example, water in the Lake is released into the canals at certain times and may be pumped back into the Lake at other times. (*Id.*). However, whereas historically the water flowed almost exclusively to the Everglades, today much of the water flow is directed to the coast. (*Trial Tr. Jan. 10, 2006*, 25:20-25).

Because water flows on a downgrade, water in the Lake flows by gravity to the south whenever the SFWMD opens the gated spillways and culverts that feed water from the Lake into the canals. (*See Trial Tr. Jan. 12, 2006*, 82:2-83:3; 89:8-13). Water from the canals generally is not capable of flowing into the Lake because it would have to flow on an upgrade. (*Trial Tr. Jan. 10, 2006*, 112:4-12; *Trial Tr. Jan. 17, 2006*, 7:1-8:1). Thus, as in its natural state, water generally flows from Lake Okeechobee south to the EAA. (*See Trial Tr. Jan. 18*,

2006, 96:24-97:4). Indeed, Plaintiffs' witness, Herbert Zebuth, who spent the bulk of his extensive career working on issues concerning Lake Okeechobee, testified that "I have never heard anyone talk about the Everglades flowing into Lake Okeechobee until this lawsuit was filed." (*Trial Tr. Jan. 17, 2006*, 9:22-23).

Nevertheless, the hurricane gates adjacent to the S-2 and S-3 pump structures may allow gravity flow from the canals into the Lake when the water level in the Lake is lower than the water level in the canals. (*See Trial Tr. Jan. 13, 2006*, 118:1-5; *Trial Tr. Jan. 17, 2006*, 8:2-4; *Plain. Ex. 115*, p. 170). Under such circumstances, and without the aid of the pump stations, surface water in the EAA canals can, and does, flow north into Lake Okeechobee. Such instances, however, remain very rare. (*See Trial Tr. Jan. 18, 2006*, 97:4-13; *Trial Tr. Jan. 19, 2006*, 37:18-21; *Plain. Ex. 115*, p. 170; *Def. Ex. 203*, p. 57; *Def. Ex. 202*, pp. 335, 345-47, 385-86, 406, 411, 551; *Def. Ex. 207*, p. 23). Moreover, the frequency of northern flow has been reduced by the Corps' removal of "humps" in the canals that had previously served as impediments to the canal waters' steady southward flow. (*See Trial Tr. Jan. 18, 2006*, 114:2-12; *Trial Tr. Jan. 25, 2006*, 25:13-15).

Every year, a substantial amount of water is discharged from the Lake to tide (*i.e.*, large quantities of Lake water are dumped into estuaries) in order to reduce the amount of water in the Lake, for example, when the water level in the Lake becomes too high. (*See Trial Tr. Jan. 19, 2006*, 51:2-8). Obviously, the

discharges, resulting in the loss of, on average, approximately 1.7 billion gallons of water to tide per day from the Everglades system, are undesirable. (*See Trial Tr. Jan. 20, 2006*, 145:14-16). However, at present, it appears that the losses are unavoidable. Because Florida experiences periods of heavy rainfall that produce water that the system is incapable of assimilating, the excess water must be discharged. (*See Trial Tr. Jan. 19, 2006*, 163:3-15). The rainy periods are followed by dry periods during which water becomes scarce. (*See id.*). The problem is exacerbated by the inability to predict weather conditions with any degree of accuracy. (*See id.*, 168:9-11, 169:17-170:14).

b. Surface Water Flow in the EAA

The Hillsboro, North New River, and Miami Canals, as well as the C-20 and C-21 Canals, collect water that is drained from their respective basins. Industrial, municipal, and construction activities are conducted within the basins. Thus canal water contains byproducts of industrial, municipal and construction activities. (*Trial Tr. Jan. 13, 2006*, 113:14-115:19).

Agricultural activities contribute immensely to the amount and direction of water flows in the EAA. When there is excess water on the farmlands, farmers pump the excess water into the canals. (*See Trial Tr. Feb. 10, 2006*, 39:23-41:10).[21] Conversely, when the farmers

21. There are approximately 300 pump stations used by the farmers in the EAA that discharge water into the SFWMD's main canals. (*Trial Tr. Feb. 9, 2006*, 32:2-4).

require water for irrigation, they withdraw water from the canals through a variety of mechanisms. (*See Trial Tr. Jan. 25, 2006*, 12:21-13:24). Each activity — taking and discharging water — requires a SFWMD permit. (*See Trial Tr. Feb. 9, 2006*, 102:4-104:15).[22]

c. Sub-Surface Water Flows

The Lake and the EAA canals are also hydrologically connected through seepage (*i.e.*, the flow of fluid through soil pores). The groundwater and surface waters of the Everglades are highly interrelated (*Trial Tr. Jan. 20, 2006*, 111:2-8), and are only truly separated in isolated areas. (*See id.*, 111:2-8, 120:7-13). Moreover, water flows through the Dike in both directions, that is, from the Lake to the EAA and vice-versa. (*See Trial Tr. Jan. 13, 2006*, 109:14-110:6; *Trial Tr. Feb. 8, 2006*, 208:2-3, 213:3-24; *Trial Tr. Feb. 9, 2006*, 7:17-20, 9:20-10:2, 24:1-3).[23] Seepage is possible because the material of which the Dike is constructed is porous. (*See Trial Tr. Feb. 8, 2006*, 209:2-210:4).

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22. Generally, farmers drain their lands during the wet season and irrigate their lands during the dry season. (*Joint Pretrial Stip.*, Attach. 5A ¶ 44). Farmers seek to maintain an optimal level of moisture in their fields; a level that depends upon the particular crop being cultivated and the stage within the planting cycle. (*See Trial Tr. Feb. 10, 2006*, 53:2-54:1).

23. Such seepage is common to all lakes. (*Trial Tr. Jan. 13, 2006*, 109:25-110:1; *Trial Tr. Feb. 9, 2006*, 11:4-6).

Appendix D

The direction that water will flow, both above and below the ground, depends on the soil matrix (porosity of the soils), and the difference in water level (water always flows from higher to lower elevations). (*See Trial Tr. Jan. 18, 2006*, 97:8-13; *Trial Tr. Feb. 8, 2006*, 208:4-209:16). Although seepage generally occurs from the Lake to the EAA (*see Trial Tr. Feb. 9, 2006*, 21:2-8), it can also flow in the opposite direction. (*See Trial Tr. Feb. 8, 2006*, 213:22-25; *Def. Ex. 244*, pp. 29-30, 32, 73).

Comprehensive studies have documented water seepage through the Dike. (*See Def. Exs. 248, 249*). The amount of seepage through the Dike, however, is small in comparison to the amount of water moved by the pump stations. (*Trial Tr. Feb. 9, 2006*, 13:2-5). Indeed, the amount of seepage is so small that the Corps does not consider seepage losses in computing the Lake's monthly water budget (total water flows into and out of the Lake). (*Def. Ex. 211*, p. 23).[24] The amount of seepage through the Dike is constantly changing, depending upon a variety of factors including, most notably, the elevation of the Lake.[25] (*See Trial Tr. Feb. 9, 2006*, 6:25-7:9).

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24. Specifically, the water budget states that "seepage is not considered as a loss from Lake Okeechobee because it is only a minor amount of the normal range of operations." (*Def. Ex. 211*, p. 23).

25. The elevation of water in the Lake is almost always higher than the elevation of water in the canals, the exception being during periods of extreme drought. (*Joint Pretrial Stip.*, Attach. 5A ¶ 17).

Appendix D

E. The Pump Stations

Although the water flows in the Everglades are controlled by numerous conveyance structures, this case focuses upon only three of the structures, the S-2, S-3, and S-4 pump stations, which are located at the southern end of the Lake.

1. *Description of Pump Stations*

The S-2, S-3, and S-4 pump stations are built into the Dike where the Dike intersects the EAA canals. (*See Joint Pretrial Stip.*, Attach. 5A ¶ 12; *Trial Tr. Feb. 8, 2006*, 205:25-206:3). The pump stations, which were constructed by the Corps (*see Trial Tr. Jan. 19, 2006*, 57:7-10), are flow diversion facilities that change the movement, flow and circulation of the waters they control. They convey water from the Miami, North New River, Hillsboro, and C-20 and C-21 canals to Lake Okeechobee. (*Joint Pretrial Stip.*, Attach. 5A ¶ 13). The rim canal, which runs along the south shore of the Lake, is the immediate receiving body of water from the pumps. (*Trial Tr. Jan. 10, 2006*, 82:16-17; *Trial Tr. Jan. 19, 2006*, 75:16-19; *Plain. Ex. 115*, p. 170).

The pumping of water from the S-2, S-3, and S-4 pump stations into the Lake has long been described as "backpumping." (*See Def. Ex. 110*, cover). Backpumping by the SFWMD has artificially added three basins totaling over 400 square miles to the watershed of Lake Okeechobee, all of which would have drained to either the south or west under natural conditions. (*See Plain.*

Ex. 110, p. 1).[26] The S-2, S-3, and S-4 pump stations have the capacity to pump excess drainage into the Lake from the northern one-third of the EAA.[27] (*See Plain. Ex. 115*, p. 166). The southern two-thirds of the EAA are drained by pump stations S-5A, S-6, S-7, and S-8, which pump water into the Water Conservation Areas. (*See id.*).

The distance between the intake of water and outflow of water through the S-2, S-3, and S-4 pump stations is less than 60 feet. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 27). When the pumps are turned on, they immediately lower the water level in the canal at the entrance to the pump station (*Trial Tr. Jan. 25, 2006*, 14:7-15), and the water is thus artificially induced to flow by gravity toward the pump station. (*See Trial Tr. Jan. 20, 2006*, 131:22-132:5). The pump stations are designed with the capacity to remove 3/4 of an inch of water (rain) per day from their respective basins. (*Joint Pretrial Stip.*, Attach. 5A ¶ 16; *Trial Tr. Jan. 13, 2006*, 64:9-11).

The pump stations convey "navigable waters" without subjecting the waters to any intervening industrial, municipal or commercial use. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 2; *see also Trial Tr. Feb. 13, 2006*, 102:10-12). Moreover, the pump stations do not introduce anything to the water as it moves through the stations. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 3).

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26. The calculations are based upon the pumps operating at full capacity.

27. The stations do not necessarily pump water from the entire area.

Appendix D

All constituents in the waters transferred by the S-2, S-3, and S-4 pump stations (e.g., phosphorous and nitrogen) are already present in the waters when they enter the pumps, either because they occur naturally or because they were introduced to the waters by some other source or land use upstream of the pump stations. (*See id.*, ¶ 28). Neither the disposal of waste (*Trial Tr. Jan. 13, 2006*, 150:24-151:18), nor the assimilation of waste (*Trial Tr. Jan. 20, 2006*, 118:20-25), may be properly characterized as a goal of the SFWMD's backpumping activities.

Each pump station contains three or four pumps, each of which is powered by a diesel engine approximately the size of three tractor-trailer engines. (*Trial Tr. Jan. 12, 2006*, 65:19-66:8; *Trial Tr. March 2, 2006*, 83:11-16). Each engine, in turn, drives a pump with an impellor that is 12 feet in diameter. (*Trial Tr. Jan. 12, 2006*, 65:17-66:2). The pumped water is discharged through a tube. (*See Trial Tr. Jan. 25, 2006*, 29:16-30:1). Massive quantities of water may be moved through the S-2, S-3, and S-4 pumps (each pump is capable of transporting approximately 900 cubic feet of water per second). (*See Trial Tr. Jan. 12, 2006*, 66:19-24; *Trial Tr. Jan. 13, 2006*, 80:16-17). The flow rate from just one of the pump stations operating at full capacity is comparable to the flow of a medium-sized Florida river. (*See Trial Tr. Jan. 12, 2006*, 67:4-6).

The S-2 pump station, located at the northern end of the Hillsboro and North New River Canals, was designed to pump excess water from the 180 square mile

S-2 drainage basin transected by the canals. (*Def. Ex. 218*, p. A-S2-1). The S-2 basin includes agricultural areas and the cities of South Bay and Belle Glade. (*Def. Ex. 200*, p. 29).

The S-3 pump station is located at the northern end of the Miami Canal and was designed to pump water from the surrounding 129 square mile S-3 basin. (*Def. Ex. 218*, p. A-S3-1). The S-3 basin includes agricultural areas and the city of Lake Harbor. (*Def. Ex. 200*, p. 52). The dominant land use in both the S-2 and S-3 basins is agriculture. (*Trial Tr. Feb. 10, 2006*, 109:18-22).

The S-4 pump station conveys water to the Lake from the 116 square mile S-4 drainage basin (sometimes referred to as the Nine Mile Canal Area). (*Def. Ex. 218*, p. A-S4-1, A-Ind-iii). The S-4 basin includes the agricultural area to the west of Clewiston and sometimes includes the City of Clewiston. (*Def. Ex. 200*, pp. 67, 69). The S-4 pump station conveys water from the C-20 and C-21 canals (three miles northwest of Clewiston) to the Lake. (*Trial Tr. Jan. 19, 2006*, 74:15-75:1).

The water backpumped into Lake Okeechobee contains at least the following pollutants: color, nitrogen, phosphorous, total suspended solids, high biological demand, dissolved solids (including dissolved organics), low quantities of dissolved oxygen, and un-ionized ammonia. (*Plain. Ex. 94*, App. F; *Plain. Ex. 9*, pp. 41-46; *Trial Tr. Jan. 9, 2006*, 50:17-51:21, 88:4-15, 93:6-20; *Trial Tr. Jan. 17, 2006*, 5:16-6:24).

Appendix D

2. *Reasons for Backpumping*

The S-2, S-3, and S-4 pump stations are integral components of the C&SF Project. (*See Trial Tr. Jan. 18, 2006*, 97:14-19; *Trial Tr. Jan. 20, 2006*, 112:20-113:3; *Trial Tr. Feb. 10, 2006*, 102:23-103:22; *Def. Ex. 205*, p. 42). The pump stations provide flood protection for the basins, communities and agricultural areas that they service. (*See Joint Pretrial Stip.*, Attach. 5B ¶ 26). Water management is essential to maintaining the agricultural activity in the EAA. (*See id.*, Attach. 5A ¶ 44). Indeed, the S-4 pump station is the only option for flood protection for the City of Clewiston. (*Trial Tr. Feb. 10, 2006*, 110:11-12).

The "tremendous majority" of backpumping episodes are meant to dispose of flood water. (*Trial Tr. Jan. 13, 2006*, 179:23-180:1). The trigger for backpumping occurs at the S-2 and S-3 pump stations whenever the water at any point in the canal reaches a level of 13 feet National Geodetic Vertical Datum ("NGVD").[28] (*Trial Tr. Jan 20, 2006*, 129:6-130:17). The trigger for backpumping at the S-4 pump station occurs whenever water in the canal reaches a level of 14 feet NGVD. (*Def. Ex. 200*, p. 66).

Flood control backpumping occurs even when the water level in Lake Okeechobee is at 18 feet (*see Trial Tr. Jan. 25, 2006*, 16:23-24), a level at which the integrity of the levee is called into question (*see id.*, 15:25-16:24),

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28. NGVD is equivalent to "above mean sea level."

and a level at which the Corps is making maximum "regulatory releases" to tide (*i.e.*, dumping large quantities of Lake water into the Caloosahatchee and St. Lucie River estuaries). (*Trial Tr. Jan. 19, 2006*, 40:3-43:4; *Def. Ex. 218*, Figures 7-1, 7-3). Failure to operate the S-2, S-3, or S-4 pump stations during severe rain events would cause flooding in communities and farmlands throughout the S-2, S-3, and S-4 basins. (*See Trial Tr. Jan. 20, 2006*, 136:21-137:8).

On rare occasions, backpumping occurs for water supply purposes.[29] Before the SFWMD may backpump for water supply purposes, it must declare a water supply emergency. (*See Trial Tr. March 2, 2006*, 21:12-17; *Plain. Ex. 228*). Once an emergency is declared, the Florida Department of Environmental Protection (the "DEP") issues an order authorizing the SFWMD to backpump for water supply purposes. (*Plain. Ex. 228*). The SFWMD backpumped for water supply purposes in 1980-81, 1985-86, 1988-89, and 2000-01. (*See Joint Pretrial Stip.*, Attach. 5A ¶ 53; *Trial Tr. Jan. 10, 2006*, 37:9-18; *Plain. Ex. 228*).

In its report to the DEP after the 2001 drought, the SFWMD distinguished backpumping conducted for "water supply augmentation" purposes from backpumping for the purpose of flood protection, although both types of backpumping occurred within the same time period. (*Plain. Ex. 29*, p. 2). The SFWMD

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29. Several municipalities obtain their drinking water from Lake Okeechobee.

explained that the flood control backpumping events "were not considered part of the water supply augmentation efforts" and their effects on the Lake were thus not covered in the report. (*Plain. Ex. 29*, p. 2; *see also Trial Tr. Jan. 17, 2006*, 68:23-69:1).

F. Effects of Backpumping on Lake Okeechobee

While the extent of the adverse effects of backpumping on the Lake is not conclusive, that the backpumping has adversely affected the Lake is not in dispute. It is important, however, to distinguish between backpumping today and backpumping in the past as, over the last 25 years, significant efforts have been made to reduce backpumping to the Lake. The following discussion highlights the conclusions of different studies conducted throughout the years.

1. *1970s Studies*

Plaintiffs entered into evidence a Florida Department of Environmental Regulation (the "DER")[30] study from August 1975, entitled "Effects of Backpumping from Agricultural Drainage Canals on Water Quality in Lake Okeechobee." (*See Plain. Ex. 110*). The report referenced a 1971 study that found that water backpumped from the Miami, Hillsboro, and North New River Canals was the poorest quality of all

30. The Department of Environmental Regulation (the "DER") was the previous name of the DEP. *See, e.g., Southwest Florida Water Mgmt. Dist. v. Charlotte County*, 774 So. 2d 903, 907 n.7 (Fla. 2d DCA 2001).

water sources to Lake Okeechobee. (*Id.*, pp. 8-10). The study noted that "[a]erial sampling demonstrated measurable influences of the drainage water (backpumped water) throughout the South Bay area of Lake Okeechobee and several miles northward in the open water." (*Id.*, abstract). The DER study ultimately found that "backpumping is [] an important cause of eutrophication[31] for Lake Okeechobee." (*Id.*).

In 1978, the SFWMD authored a study entitled "Water Quality in the Everglades and its Impact on Lake Okeechobee." (*See Plain. Ex. 109*). The study found that, at the rim canal — the immediate receiving body of the backpumped water — "[n]itrogen, phosphorous, and conductivity were all higher during backpumping periods, while dissolved oxygen concentrations were lower." (*Id.*, p. 8; *see also Trial Tr. Jan. 10, 2006*, 33:15-18). The study further found that the effects of backpumping became less noticeable further into the Lake. (*Plain. Ex. 109*, p. 8). The immediate zone of influence of backpumping did not extend more than four miles from the pumps. (*See id.*; *Trial Tr. Jan. 10, 2006*, 33:19-34:4). Moreover, the study concluded that from May 1973 through May 1977, the EAA contributed 15% of the total phosphorous input, and 35% of the total nitrogen input, to the Lake. (*Plain. Ex. 109*, p. 9)

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31. Eutrophication refers to the process by which a lake becomes increasingly biologically productive (meaning more photosynthesis takes place) as nutrients are added to the water body. (*See Trial Tr. Jan. 9, 2006*, 39:3-9, 66:7-67:3).

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2. *1981 Water Supply Backpumping Event*

In 1981, as a result of an extended drought, the SFWMD backpumped water for water supply purposes. The SFWMD subsequently issued a report on the effects of this backpumping event on the water quality of the Lake. (*See Plain. Ex. 115*). Only the S-2 and S-3 stations pumped during the event. (*Id.*, p. 166).

The study found that conductivity increased at the sampling site near the S-2 and S-3 pump stations although it had decreased during the same time period throughout the remainder of the Lake. (*See id.*, p. 173). The report noted that highly mineralized canal water remained largely undiluted as far as eight kilometers into the Lake. (*Id.*). The study concluded as follows:

> The data presented here show that S-2 and S-3 discharges influenced water quality in the lake at least as far as station 6, which is 14.0 km from the south shore. This indicates that these inflows affected a far greater area than has been shown in previous studies. . . . The more widespread impact resulted from the diminished dilution capacity of the lake and the highly intense discharge from the EAA.

(*Id.*, p. 178).

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3. *1996 Backpumping Study*

In 1996, the SFWMD drafted a report entitled "Evaluation of Water Quality Criteria in the Everglades Protection Area." (*See Plain. Ex. 9*).[32] The SFWMD tested thirteen water quality parameters,[33] comparing water quality during periods of backpumping and no-backpumping. (*Plain. Ex. 9*, p. 46; *Trial Tr. Jan. 9, 2006*, 86:21-22). The study found that there was statistically significant worsening in twelve of the thirteen water quality parameters when S-2 was operating, eight of the thirteen parameters when S-3 was operating, and ten of the thirteen parameters when S-4 was operating. (*Plain. Ex. 9*, p. 46; *Trial Tr. Jan. 12, 2006*, 52:1-56:21). However, the study also found that "[a]lthough backpumping events did transfer nutrients and other pollutants at some level into the lake, overall water quality impacts to the lake could not be established due to effects of dilution, pollutant decay, particulate settling, and nutrient uptake which were not considered in [the] study." (*Plain. Ex. 9*, p. 44).

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32. It does not appear that a final version of the report, if one exists, was entered into evidence.

33. The parameters were: alkalinity as CaCO3, field conductivity, dissolved oxygen, pH, total suspended solids, turbidity, total chloride, total phosphorous, ortho-phosphorous, total nitrogen, nitrate and nitrite, ammonia dissolved and total kjeldahl nitrogen. (*See Plain. Ex. 9*, p. 46).

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4. *2001 Backpumping Event*

In 2001, drought conditions again required the SFWMD to backpump for water supply purposes. On December 14, 2001, the SFWMD submitted its "Lake Okeechobee Water Supply Backpumping and Water Supply Augmentation After Action Report." (*See Plain. Ex. 29*). Herbert Zebuth characterized the 2001 study of backpumping as the most thorough he had ever seen. (*Trial Tr. Jan. 18, 2006*, 10:16-20, 22:6-15).

The report found that "biological monitoring indicated no negative impacts of the backpumping operation on SAV [submerged aquatic vegetation] or water transparency." (*Plain. Ex. 29*, p. 4). Ultimately, the report concluded that an "[a]nalysis of the data collected in the Water Quality and Biological Monitoring programs associated with the emergency final orders did not indicate adverse impacts to Lake Okeechobee attributable to the emergency water supply backpumping and flow augmentation operations." (*Id.*, p. 8). Furthermore, no large algal blooms were reported as a result of the 2001 water supply backpumping event. (*Trial Tr. Jan. 11, 2006*, 23:19-24:2).

The final SFWMD study is in some respects contradictory to a draft of an article entitled "Effects of Pumping Rainfall Runoff from Agriculture Fields into Lake Okeechobee." (*See Plain. Ex. 18*). The draft, which studied the effects of the 2001 backpumping event on Lake Okeechobee, concluded as follows:

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Water quality monitoring documented poorer light penetration and chlorophyll and nutrient levels up to an order of magnitude higher at the impact site. Along with measurable levels of six heavy metals, five pesticides were found in backpumped water. When compared with data from backpumping in the 1970's, the magnitude of difference in nutrients between backpumped and reference water was comparable to 2001. Although not lethal, there were some negative ecological impacts of backpumping on SAV [submerged aquatic vegetation] communities of Lake Okeechobee. There appeared to be some impacts on Vallisneria, with a lower number of blades (and smaller photosynthetic surface area) in the impact water after two weeks. By four weeks, however, these differences disappeared. Results from the short duration of these incubations does [sic] not indicate whether long-term impacts on Vallisneria might be apparent. In contrast, there was significantly lower biomass of Chara in the backpumped assays, attributed to extensive epiphytization and the development of a sediment algal mat. It is unknown to what extent this nuisance benthic algal mat might influence emergence of growth of SAV in the field.

(*Plain Ex. 18*, p. 1). The source of the seemingly inconsistent conclusions was not clarified at trial.

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5. *Karl Havens' Experiment*

Over time, scientists theorized that because the algal blooms that adversely impacted the Lake were believed to have been caused by low nitrogen/phosphorous ratios, one solution to the problem might include pumping nitrogen-rich waters, such as the waters from the EAA, into the Lake. (*See Plain. Ex. 52*, p. 1). Karl Havens, a scientist with the SFWMD, conducted an experiment pursuant to which he added canal water to Lake water to determine whether backpumping might have any positive effects. (*See id.*). Specifically, he wanted to determine whether backpumping could decrease the amount of blue/green algae in the Lake. (*See id.*). The idea was that by changing the total nitrogen/phosphorous ratios in the Lake through the introduction of backpumped waters, the nature of the algal communities in the Lake could be beneficially altered. (*See Trial Tr. Jan. 18, 2006*, 39:10-20).

Mr. Havens ultimately concluded that "the results of [the] study indicate a risk for ecological damage if backpumping of EAA canal water was substantially increased." (*See Plain. Ex. 52*, p. 35). The report further warned against increased backpumping without additional experimentation and found that even if there were benefits that could result from backpumping, backpumping only represented a temporary fix to the Lake's problems. (*See id.*).

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6. *Effects of Backpumping on Drinking Water*

Lake Okeechobee serves as the drinking water source for the cities of Belle Glade, Clewiston and South Bay, among others. (*Joint Pretrial Stip.*, Attach. 5A ¶ 6). When backpumping occurs, the City of South Bay's drinking water plant experiences increases in the water's hardness, turbidity and color. (*Id.*, ¶ 25). The SFWMD has received complaints from South Bay, Belle Glade, Pahokee and Clewiston that backpumping causes an unpleasant odor and taste in the cities' water supplies. (*Plain. Ex. 65C*). Therefore, the SFWMD sends advance notification of impending backpumping events to the City of Belle Glade. (*Id.*). Furthermore, the 2001 emergency order that the DEP issued to the SFWMD authorizing water supply backpumping required that the SFWMD reimburse the cities surrounding the Lake for any increased costs of water treatment caused by the backpumping. (*Trial Tr. Jan. 12, 2006*, 136:19-137:1; *Plain. Ex. 54; Plain. Ex. 117*, p. 7).

Dr. William Wise, a hydrologist, environmental engineer, and chemist, testified that he visited three water treatment plants eight days after a two-day S-2 backpumping event that occurred during the trial. (*Def. Ex. 124; see also Trial Tr. Feb. 15, 2006*, 16:7-9).[34] The intake water at the South Bay plant (which Plaintiffs claim is closest to the S-2 pump station) was noticeably colored and significantly darker than intake water from

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34. The backpumping occurred from February 4, 2006 through February 6, 2006. (*Trial Tr. March 2, 2006*, 16:5-6).

the Belle Glade or Pahokee plants. (*Trial Tr. Feb. 15, 2006*, 16:23-17:2, 54:9-55:11). Dr. Wise attributed the poor water quality at the water intakes to the backpumping episode. (*Id.*, 55:12-15).

Defendants, however, presented testimony that the water quality issues were likely caused by dredging activities that became necessary as a result of the 2005 hurricane season, and not the backpumping event. (*See Trial Tr. March 2, 2006*, 46:5-24). Defendants presented further testimony that, in fact, Belle Glade, as opposed to South Bay, is the closest intake structure to the S-2 pump. (*Id.*, 85:22-86:1).

G. Similarities and Differences Between the Lake and the Canals

As noted, the Lake is by no means a uniform body of water and there is much variability between and within the different regions of the Lake. Moreover, the rim canal of the Lake, the immediate receiving body of backpumped waters, is more similar chemically to the EAA canals than is the rest of Lake Okeechobee.[35] (*See Trial Tr. Jan. 9, 2006*, 120:14-121:6; *Trial Tr. Jan. 10, 2006*, 149:14-21). Additionally, it is important to note that most of the water in the canals likely originated in Lake Okeechobee. (*Trial Tr. Feb. 10, 2006*, 118:25-119:3). Notwithstanding the commonality of elements, several

35. Although the water in the rim canal is similar to the waters in the canals in many respects, a plume is still visible when water is backpumped into the rim canal. (*Trial Tr. Jan. 9, 2006*, 120:23-25).

witnesses testified that there are certain characteristics unique to the canals while other characteristics are unique to the Lake.

1. *Structural Characteristics*

The canals are cut into the bedrock. (*Trial Tr. Jan. 17, 2006*, 13:7-10). Consistent with their role as water conduits, they were designed and constructed to have vertical sides and a flat bottom. (*Joint Pretrial Stip.*, Attach. 5A ¶ 20; *Trial Tr. Jan. 10, 2006*, 91:7-92:1; *Trial Tr. Jan. 12, 2006*, 70:10-18). In contrast, the Lake was most likely formed as a result of the uneven settling of materials during the period when Florida rose above the ocean. (*Trial Tr. Jan. 17, 2006*, 12:25-13:6). Thus, the Lake has taken the form of a bowl-shaped depression. (*See id.*).

The structural differences between the Lake and the canals mean that the Lake is subject to winds and other physical forces that do not affect the canals in a meaningful way. (*Trial Tr. Jan. 12, 2006*, 70:15-18). On a related note, the waters of the Lake mix far more than do the canal waters. (*Id.*, 85:9-12). As a result of the different mixing regimes, chemicals that enter the canals have a longer residence time than do those entering the Lake. (*Id.*, 85:12-15).

2. *Water Quality*

The canals and the Lake are classified differently under Florida and federal law. Unless otherwise delineated, "[t]he surface waters of the State of Florida

are classified as Class III." Fla. Admin. Code r. 62-302.400(1). The canals are designated as Class III waters, to be used for recreation and propagation and maintenance of a healthy, well-balanced population of fish and wildlife. (*Joint Pretrial Stip.*, Attach. 5A ¶ 19; *see also* Fla. Admin. Code r. 62-302.400(4)).

In contrast to the Class III designation of the canals, Florida has designated Lake Okeechobee as a Class I water body, or potable water supply. (*Joint Pretrial Stip.*, Attach. 5A ¶ 6; *see also* Fla. Admin. Code r. 62-302.400). As a Class I water body, the Lake must meet more stringent water quality criteria than the Class III canals. (*Joint Pretrial Stip.*, Attach. 5A ¶ 22). The total maximum daily load ("TMDL") of a particular pollutant permitted to enter a Class I water body will often be less than the load permitted to enter a Class III water body. (*See Trial Tr. Jan. 17, 2006*, 32:22, 33:7-9). Nevertheless, there are many similarities in water quality standards for Class I and Class III waterways (*i.e.*, the criteria for some pollutants are identical). (*See id.*, 32:7-33:13).[36]

As would be anticipated, the water quality in the Lake is generally better than the water quality in the

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36. A water body may have multiple classifications. For instance, a river may be classified as a Class I water body at one point and be classified as a Class III water body downstream, or vice-versa. (*See Trial Tr. Jan. 17, 2006*, 37:13-25). The different classifications may exist even though there is no physical boundary marking the dividing point between the two classifications. (*See id.*, 42:15-17).

canals. A September 2005 draft report from the Corps addresses water quality in the Lake and the canals. (*See Plain. Ex. 94; Def. Ex. 32*). The study utilized data collected from June 4, 1973 through January 18, 2005. (*Id.*, F-86). It concluded that "[i]n both S-2 and S-3, water quality exiting [Lake Okeechobee] was of higher quality than water entering [Lake Okeechobee]." (*Id.*, F-89). As compared to the Lake, the canal waters were higher in most nutrients and lower in dissolved oxygen (at least at S-2 and S-3). (*See id.*, F89-91).

The differences in nutrient levels between the canals and the Lake are not surprising. Although canal waters largely originate in the Lake, the canals also receive runoff from the EAA, including waters pumped off of agricultural lands. Additionally, the muck soils in the EAA were formed from partially decomposed plants, causing the soils to have a different chemistry than the sand bottoms of the Lake.[37] (*Trial Tr. Jan. 10, 2006*, 90:1-8; *see also Def. Ex. 243*, pp. 27-28). As the universal solvent, water picks up the characteristics of its location. (*See Trial Tr. Jan. 20, 2006*, 53:10-12; *see also Trial Tr. Feb. 10, 2006*, 119:3-7). Thus, the waters in the canals have incorporated many of the natural characteristics of the EAA.

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37. Wetlands tend to have low dissolved oxygen even in their natural state. (*See Trial Tr., Jan. 9, 2006*, 118:14-19).

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3. *Biology*

In a well-taken analysis, Dr. Thomas Crisman, professor of environmental science at the University of Florida and director of the Odum Center for Wetlands, explained that

> within any eco-system type there can be a great deal of variability, but when you are looking at the variability that takes place within Lake Okeechobee, that's variability among biological components that are lake components. When you look at variability within the canals, it's variability within the components that are characteristics of canals.

(*Trial Tr. Jan. 9, 2006*, 46:5-12).

Many species of birds thrive in shallow waters. (*See Trial Tr. Jan. 10, 2006*, 90:24-91-12). The Lake contains many shallow areas in which birds may wade. (*See id.*). However, because the canals have steep walls, birds generally are not capable of wading in the canals unless the water level is extremely low. (*See id.*). Furthermore, the big broad flats of the Lake allow certain plants to live in the Lake that are unable to live in the far narrower canals. (*See id.*, 91:13-19).

Additionally, as explained by biologist Dr. Paul Gray, whose expertise is in the area of lake ecology and ducks,

> [c]anals, because of their nature, go up and down very rapidly. If you are a bird, you are

> depending on the canal to get a steady supply of food. You have to keep your young alive. You can't rely on a canal. . . . Canals are just not the same [type] of habitat ecologically for various marsh organisms. . . . The lack of a normal hydrology, the lack of shallow water, the lack of expanse of habitat really makes canals a lot different from Lake Okeechobee . . . .

(*Id.*, 91:23-92:19; *see also Trial Tr. Jan. 17, 2006*, 14:7 (biological differences between Lake and canals are "severe")). Dr. Gray added that "canals don't have the same water cycle vegetation, the same spatial extent. They are very different." (*Trial Tr. Jan. 10, 2006*, 94:1-3).[38]

H. Programs Addressing Current Environmental Problems

1. *Recognition of Problems in the Lake*

Over the years, it has become increasingly apparent that although Florida succeeded in reclaiming much of the Everglades for human use, the natural environment has suffered as a result of these efforts. What remains of the natural Everglades is in a continuing state of decline. (*Joint Pretrial Stip.*, Attach. 5B ¶ 49). The

38. The rim canal, into which the canal waters are pumped, attracts species of birds that would generally be attracted to the canals. (*See id.*, 150:5-10). As noted, the rim canal is similar to the canals in other respects. (*See Trial Tr. Jan. 9, 2006*, 120:14-121:6; *Trial Tr. Jan. 10, 2006*, 149:14 21).

adverse situation is primarily attributable to the Everglades' diminished capacity to retain the huge volume of water that once pooled and sheet flowed across the landscape. (*Id.*). These waters are now either discharged in massive volumes through canal systems to tide, or are stored at unnaturally high levels in the Water Conservation Areas ("WCA[s]"). (*Id.*).

Many of the area's problems are now recognized as unanticipated consequences of the C&SF Project. (*Joint Pretrial Stip.*, Attach. 5B ¶ 49). The problems are exacerbated by the inescapable reality that people continue to move to South Florida at one of the highest rates in the nation. (*Id.*). The result is a currently non-sustainable system of urban, agricultural and natural environments in South Florida that exceeds the capacity of, or is hampered by, the existing system of water management. (*Id.*, ¶ 50).

The problems facing the Everglades have been examined in many studies conducted over the past 35 years, many of which have been funded by the SFWMD. (*See Trial Tr. Jan. 11, 2006*, 6:15-7:3). For example, in 1969, a United States Geological Survey report concluded that: (1) Lake Okeechobee was eutrophic; (2) the EAA was a principal source of nitrogen loadings to the Lake; (3) backpumped waters were very high in nitrogen, had high specific conductance, and had low turbidity; and (4) the most impacted parts of the Lake were the rim canal and the South Bay littoral zone. (*Joint Pretrial Stip.*, Attach. 5A ¶ 35).

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A series of scientific studies subsequently conducted confirmed the conclusion that the Lake was undergoing a process of man-induced (anthropogenic) eutrophication and that backpumped EAA flood water contributed significantly to Lake eutrophication. (*See Plain. Ex. 111*, pp. 49-52). In 1976, the Florida Department of Administration, the DER, and the Central and Southern Florida Flood Control District participated in a report that ultimately recommended that: (1) backpumping from S-2, S-3, and S-4 and by private interests should be eliminated or reduced to the maximum degree feasible; (2) the EAA canals should be enlarged to enable the largest feasible amount of water now backpumped to be routed southward for storage; (3) as much of the backpumped water as feasible should be stored for recyle [sic] within the EAA; and (4) a detailed study of alternatives to backpumping by private interests and the S-4 pump station should be conducted. (*Plain. Ex. 111*, pp. 80-84). The study, however, did not recommend that backpumping be eliminated. (*See id.; Trial Tr. Jan. 17, 2006*, 51:21-52:1).

The State of Florida has declared the Lake to be impaired (not meeting its designated uses) "due to phosphorus, dissolved oxygen, iron, un-ionized ammonia, coliforms and chlorides." (*Plain. Ex. 20*, p. 8). Florida has also recognized that the health of the Lake's natural resources is threatened by three primary stressors: (1) excessive phosphorous loads; (2) harmful high and low water levels; and (3) the spread of exotic vegetation. (*Joint Pretrial Stip.*, Attach. 5B ¶ 31).

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2. *Efforts to Restore Lake Okeechobee and the Everglades*

To combat the enormous problems facing Lake Okeechobee, the state and federal governments have gone to great lengths to restore the system. Many of the programs build upon each other. The following summarizes the major programs/actions upon which the Court heard testimony and received evidence.

a. SFWMD Duties

In 1972, the Florida legislature expanded the SFWMD's duties to include management, on a holistic basis, of all water resources throughout Central and South Florida. (*Trial Tr. Jan. 20, 2006*, 113:20-114:1). In keeping with the goal of protecting the environment, the SFWMD and other agencies have conducted extensive research to address the water quality problems of the Lake. (*Joint Pretrial Stip.*, Attach. 5B ¶ 47). Many scientists have been studying the Lake to ascertain the optimal manner of restoration, spending millions of dollars to examine not only the Lake but the interactions occurring within the entire ecosystem. (*Trial Tr. Jan. 11, 2006*, 6:17-7:25). Notwithstanding its efforts, however, the SFWMD has been the source of considerable criticism and has been forced to defend numerous lawsuits over the years.

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b. Interim Action Plan and Temporary Operating Permit

In the late 1970s, environmental groups filed suit against DER, alleging that it had failed to require the SFWMD to obtain a pollution permit for the structures that were discharging water and pollutants into Lake Okeechobee. (*Trial Tr. Jan. 12, 2006*, 97:18-98:3). The parties eventually entered into a consent decree, pursuant to which DER issued a temporary operating permit to the SFWMD that required the development of interim actions to reduce nutrient impacts to the Lake. (*See id.*, 101:11-16; *Plain. Ex. 112*). The permit also required the development of a longer-range analysis of options for reducing pollution levels. (*See id.*).

One important consequence of the consent decree was the development of a modified backpumping schedule called the Interim Action Plan ("IAP"). (*See Trial Tr. Jan. 12, 2006*, 101:17-106:10; *Plain. Ex. 113*). The IAP established a point system to determine when backpumping for purposes other than water supply is appropriate. (*See Trial Tr. Jan. 12, 2006*, 104:10-105:4; *Plain. Ex. 113*). In other words, under the IAP, the SFWMD is permitted to backpump into the Lake from the S-2 and S-3 pump stations only under certain conditions.[39] (*Plain. Ex. 113*, Table 5).

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39. The requirements of the IAP do not apply to the S-4 pump station. (*Plain. Ex. 113; Trial Tr. Jan. 17, 2006*, 116:15-16; *Trial Tr. Feb 13, 2006*, 42:5-6).

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One of the primary goals of the IAP was to move nutrient-rich waters south into the WCAs or out to tide rather than moving them north into the Lake. The IAP has successfully reduced the amount of water moving north into the Lake. At most, the S-2 and S-3 pumps now operate only a few days per year. (*Trial Tr. Feb. 10, 2006*, 105:20-21). There are estimates that the IAP has reduced the flows from the EAA to the Lake by 90 to 95 percent. (*Trial Tr. Jan. 10, 2006*, 138:15-19; *Trial Tr. Jan. 20, 2006*, 128:12-18). Today, the S-2, S-3, and S-4 pump stations, together, contribute no more than six percent of the total inflows to Lake Okeechobee (on a multi-year average). (*See Joint Pretrial Stip.*, Attach. 5B ¶ 29; *Trial Tr. Jan. 25, 2006*, 54:17-22, 66:4-8).

Plaintiffs, however, provided testimony that, over the years, backpumping has occurred even when the conditions specified in the IAP were not met (*i.e.*, when the point total was not high enough). (*See Trial Tr. Jan. 13, 2006*, 176:23-179:22, 181:13-21). Moreover, because the IAP does not apply to backpumping for water supply purposes, under certain circumstances, a significant amount of water could be backpumped outside the bounds of the IAP. (*Trial Tr. Jan. 12, 2006*, 105:14-16).

c. 1983 Operating Permit

In 1983, the DEP issued to the SFWMD an operating permit that placed limits on the amount of phosphorous and nitrogen that could be discharged from SFWMD structures into Lake Okeechobee. (*Plain. Ex.*

114). The permit also set deadlines for meeting the reduction requirements. (*See id.*). It specifically regulated discharges from 14 major inflow structures to the Lake. (*Joint Pretrial Stip.*, Attach. 5A ¶ 55). Importantly, the operating permit incorporated the backpumping criteria of the IAP. (*See Trial Tr. Jan. 18, 2006*, 7:8-15). The 1983 operating permit for the SFWMD was meant only to establish temporary goals and was scheduled to expire in 1988. (*See Trial Tr. Jan. 11, 2006*, 76:13-17; *Trial Tr. Jan. 12, 2006*, 125:13-126:8). The 1983 permit is still in effect. (*Trial Tr. Jan. 12, 2006*, 126:9-128:2; *Trial Tr. Jan. 25, 2006*, 110:24-111:1).

Herbert Zebuth summarized the SFWMD's compliance with the 1983 permit in a report that was entered into evidence. (*See Plain. Ex. 93*). His report was based on data provided by the SFWMD. (*Trial Tr. Jan. 12, 2006*, 61:4-6). The analysis, and Mr. Zebuth's testimony, indicate that the permit's nutrient targets have been continually exceeded throughout the years. (*See Joint Pretrial Stip.*, Attach. 5A ¶ 24; *see also Plain. Exs. 45, 93*; *Trial Tr. Jan. 12, 2006*, 111:22-23, 116:8-20).

d. Surface Water and Improvement Act

In 1985 and 1986, the Lake experienced a massive algal bloom that attracted widespread public attention. (*See Trial Tr. Jan. 12, 2006*, 40:23-25). In response, Florida passed the Surface Water and Improvement ("SWIM") Act, which required development of a plan to improve the water quality of the Lake and other water bodies by 1988, and required compliance with a numeric

phosphorous reduction goal by a date certain. (*Id.*, 40:23-41:12). The stated legislative intent of the SWIM Act is as follows:

> The Legislature finds that the water quality of many of the surface waters of the state has been degraded, or is in danger of becoming degraded, and that the natural systems associated with many surface waters have been altered so that these surface waters no longer perform the important functions that they once performed. These functions include:
>
> > (a) Providing aesthetic and recreational pleasure for the people of the state;
> >
> > (b) Providing habitat for native plants, fish, and wildlife, including endangered and threatened species;
> >
> > (c) Providing safe drinking water to the growing population of the state; and
> >
> > (d) Attracting visitors and accruing other economic benefits.

Fla. Stat. § 373.451.

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The SWIM Act mandates that each water management district "maintain a list that prioritizes water bodies of regional or statewide significance within the water management district." Fla. Stat. § 373.453(1)(a). The lists are to be reviewed and updated every five years. *Id.* The SWIM Act specifically requires that the SFWMD prioritize the restoration of Lake Okeechobee and its tributaries. Fla. Stat. § 373.453(1)(c)(1). Water management districts are authorized to develop surface water improvement and management plans for the water bodies within their district. Fla. Stat. § 373.453(2). Those plans should include, among other things, the identification of point and nonpoint sources of pollution to the water body and strategies for restoring and protecting the water body. *Id.*

The plan developed for Lake Okeechobee set a goal of a 40% reduction in phosphorous loading to the Lake (from the watershed) from the baseline levels that existed from 1973-1979. (*Joint Pretrial Stip.*, Attach. 5A ¶ 64).[40] From 1991-2000, an average of 433 metric tons of phosphorous entered the Lake annually. (*Def. Ex. 28*, p. 11; *see Trial Tr. Jan. 12, 2006*, 122:5-22). Accordingly, the 1997 SWIM Plan update reported that although the Plan had achieved phosphorus load reductions, the 40% reduction goal had not been achieved. (*Joint Pretrial Stip.*, Attach. 5A ¶ 67). Similarly, the 2002 SWIM Plan update found that phosphorous loading far exceeded

40. The SWIM Plan did not address nitrogen loading to the Lake. (*Joint Pretrial Stip.*, Attach. 5A ¶ 61).

the amount considered necessary to achieve a healthy Lake and found that it could take decades before the beneficial results of phosphorous loading reductions were realized. (*Joint Pretrial Stip.*, Attach. 5A ¶ 69).

e. 1988 Consent Decree and Everglades Forever Act

In 1988, the United States filed suit against the SFWMD and the State of Florida over activities that allowed pollutants to enter the Everglades. *See United States v. So. Florida Water Mgmt. Dist.*, Case No. 88-1886-Civ. Specifically, the suit concerned the SFWMD's movement of polluted waters to Everglades National Park. A consent decree reached in the 1988 suit resulted in the construction of stormwater treatment areas ("STA[s]") in the southernmost portion of the EAA (*Trial Tr. Jan. 13, 2006*, 92:22-93:4), and the construction of new pump stations approximately five miles north of the S-7 and S-8 pump stations for the purpose of pulling canal water into the STAs. (*Def. Exs. 1, 118*).

In the aftermath of the litigation, Florida passed the Everglades Forever Act.[41] *See* Fla. Stat. § 373.4592. The Everglades Forever Act mandates that a series of actions be taken to restore the Everglades. At trial, Defendants focused on the best management practices ("BMP") program established by the Act. The BMP program is a regulatory program meant to control the

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41. The Everglades Forever Act was initially known as the Everglades Protection Act. (*Trial Tr. Feb. 9, 2006*, 34:11-13).

release of pollutants before they enter navigable waters. (*Trial Tr. Feb. 9, 2006*, 37:12-22). The BMP program is considered a source control program. (*Id.*, 37:11-23). All landowners within the EAA who utilize the works of the district must apply for a BMP permit. (*Id.*, 34:8-25; Fla. Admin. Code r. 40E-63.110(1)).

Landowners may receive general, individual or master permits. General permits are issued under the program for smaller parcels of land. *See* Fla. Admin. Code r. 40E-63.120. To obtain an individual permit, an applicant must, among other things:

> (1) Submit and implement a BMP Plan which includes:
>
> > (a) A description of Best Management Practice implementation and operation;
> >
> > (b) A description of Best Management Practice rationale (Best Management Practice research can be used to supplement data where appropriate);
> >
> > (c) A consideration of the Best Management Practices [from a list] . . . and an explanation of why Best Management Practices not included in the BMP Plan are not suitable for implementation;

> (d) A fertilization and water management plan for each crop, combination of crops or farming units;
>
> (e) A water management system design plan, including a water budget, probable volume and timing of discharge, nutrient recovery rationale, field water management strategies, infrastructure descriptions, and inter- and intra-operation water routing;
>
> (f) A monitoring plan to verify Best Management Practice implementation, operation and effectiveness . . . ;
>
> (g) An education and training program for management and operation staff responsible for implementing and monitoring the approved BMP Plan;
>
> (h) A schedule for implementing the BMP Plan. . . .

Fla. Admin. Code r. 40E-63.136. Each permit has a five-year life (*see Trial Tr. Feb. 9, 2006*, 35:20-21), and is subject to modification. (*Id.*, 39:4-10).

Master permits are only issued to landowners who agree to oversee implementation of the permit for all of the landowners within an area. (*See id.*, 56:15-16).

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Master permits must meet all the conditions that are required to obtain an individual permit. Fla. Admin. Code r. 40E-63.156(1)(a). In addition, "[t]he permittee [must] demonstrate sufficient legal and financial capability to carry out all acts necessary to implement the terms and conditions of the Master Permit, including the ability to take necessary enforcement action." Fla. Admin. Code r. 40E-63.156(1)(b).

The DEP has developed a list of best management practices that farmers may administer. (*See Trial Tr. Feb. 9, 2006*, 43:1-16). Each practice is assigned a point value and farmers must choose a combination of practices for which the associated point values total 25 points. (*See id.*). The theory behind the system is that farmers are able to choose BMPs that best suit their needs and are cost effective. (*See id.*, 43:12-44:6).

The goal of the BMP regulatory program is to reduce the total phosphorous loadings discharged from the EAA by a minimum of 25% annually. Fla. Admin. Code r. 40E-63.101(1). If the basin achieves certain reduction goals, farmers may receive tax relief. (*See id.*). If the basin does not achieve a goal, each farmer's compliance efforts is analyzed individually. (*See id.*). The program has resulted in, on average, an annual 50% reduction in phosphorous loading against the baseline. (*See Trial Tr. Feb. 9, 2006*, 52:11-15).

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f. Total Maximum Daily Loads to Lake

Section 303(d) of the CWA mandates that each state submit a list of all impaired water bodies to the EPA and subsequently establish a TMDL for each impaired water body.[42] *See* 33 U.S.C. § 1313(d). In 1998, FWF and other parties sued the EPA in federal court over its failure to require Florida to set TMDLs for the State's water bodies (including Lake Okeechobee), as required under the CWA. (*Trial Tr. Jan. 26, 2006*, 58:24-59:22). In 1999, a consent decree was entered, pursuant to which the Florida legislature enacted the Watershed Restoration Act of 1999, Fla. Stat. § 403.067, and, later, the Lake Okeechobee Protection Act, Fla. Stat. § 373.4595. (*See id.*, 60:9-61:3).

The Watershed Restoration Act of 1999 ("WRA") requires the DEP to list, and prioritize, all bodies of water in the State for which "total maximum daily load assessments will be conducted." Fla. Stat. § 403.067(2). The statute lists methodologies pursuant to which the DEP "shall conduct a total maximum daily load assessment of the basin in which the water body or water body segment is located." Fla. Stat. § 403.067(3). "If the DEP determines, based on the total maximum daily load assessment . . . that water quality standards

42. The TMDL is based upon each water's assimilative capacity with respect to a given nutrient/pollutant (*i.e.*, the amount of the nutrient/pollutant that may enter the water without causing an adverse effect sufficiently severe to cause the water to become unfit for its designated use). (*See Trial Tr. Feb. 13, 2006*, 82:12-21).

are not being achieved and that technology-based effluent limitations and other pollution control programs . . . are not sufficient to result in attainment of applicable surface water quality standards," the water body must be added to a list of water bodies for which total maximum daily loads will be calculated. Fla. Stat. § 403.067(4). The list "must specify the particular pollutants causing the impairment and the concentration of those pollutants causing the impairment relative to the water quality standard." *Id.* The legislation further provides criteria and methodologies to be used in calculating the maximum daily loads. Fla. Stat. § 403.067(6).

The WRA imbues the DEP with a variety of tools with which to achieve the TMDLs. The DEP may "develop a basin management action plan that addresses some or all of the watersheds and basins tributary to the water body." Fla. Stat. § 403.067(7)(a)(1). The basin management action plan must include milestones for implementation of the plan and for water quality improvement, and must include a water quality monitoring component sufficient to evaluate whether reasonable progress in pollutant load reductions is being achieved. Fla. Stat. § 403.067(7)(a)(5). Moreover, the DEP may develop BMPs. Fla. Stat. § 403.067(7)(c). Finally, in implementing the TMDL, the DEP may utilize: (1) permitting and other existing regulatory programs; (2) nonregulatory and incentive-based programs; (3) other water quality management and restoration activities; (4) pollutant trading or other equitable economics-based agreements; (5) public works including

capital facilities; and/or (6) land acquisition. Fla. Stat. § 403.067(7)(b).

In 2001, pursuant to the WRA, the DEP adopted for Lake Okeechobee a TMDL for phosphorous of 140 metric tons. Fla. Admin. Code r. 62-304.700(1). Attainment of the TMDL is "calculated using a 5-year rolling average of the monthly loads calculated from measured flow and concentration values." *Id.* The TMDL is more stringent than the phosphorous goals established in the 1983 operating permit or the SWIM Plan. (*See Joint Pretrial Stip.*, Attach. 5A ¶ 71).

In 2000, the Florida legislature passed the Lake Okeechobee Protection Act (the "LOPA"), Fla. Stat. § 373.4595, in order to achieve the 140 metric ton TMDL for phosphorous established under the WRA. The LOPA establishes a watershed-based approach to the problems facing the Lake, *see* Fla. Stat. § 373.4595(1)(d), and calls for the immediate implementation of the Lake Okeechobee Protection Program. Fla. Stat. § 373.4595(3). The Protection Program has several different components. Specifically, the LOPA requires the adoption of a formal Lake Okeechobee Protection Plan (the "LOPP") and annual reports, and implementation of the Lake Okeechobee Construction Project (the "LOCP"), a watershed phosphorous source control program, a research and water quality monitoring program, in-lake phosphorous management evaluation, and an exotic species control program. (*See Def. Ex. 28*, p. E-1)

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The Final LOPP, prepared by the SFWMD, the DEP and the Florida Department of Agriculture and Consumer Services, was issued on January 1, 2004. The LOPP set a target date of 2015 to meet the phosphorous TMDL of 140 metric tons. (*Def. Ex. 28*, p. E-1). The total cost of implementing the LOPP is estimated to be approximately $ 322.2 million (in 2003 dollars).[43] (*Id.*, p. E-2).

The LOPP, which is to be re-evaluated every three years, anticipates achieving phosphorous reduction through the implementation of owner-implemented BMPs, funded cost-share BMPs and other phosphorous reduction projects. (*Def. Ex. 28*, p. 12). The LOPP also requires that the SFWMD submit an application to update the operating permit for all structures discharging into the Lake. (*Id.*, 3). As previously noted, the SFWMD is currently operating under the 1983 permit.

g. Comprehensive Everglades Restoration Project

Meanwhile, in 1992, Congress directed a restudy of the C&SF Project to address the problems associated with the Project. (*Trial Tr. Jan. 13, 2006*, 62:9-13). The restudy, which eventually became known as the Comprehensive Everglades Restoration Plan (the "CERP"), sought to establish a revised plan for addressing the problems of the Lake, the Everglades

43. The costs are to be borne by multiple stakeholders, including the SFWMD, landowners, and the State and federal governments. (*See Def. Ex. 28*, p. E-3).

and the remainder of the ecosystem. (*Trial Tr. Feb. 10, 2006*, 122:21-23). Although the CERP has water quality components, its primary focus is on water quantity (*i.e.*, ensuring that there is sufficient water available to provide for the population's needs). (*See id.*, 15:20-16:13). The CERP has no direct role in cleaning up Lake Okeechobee. (*Trial Tr. Feb. 17, 2006*, 16:5-10). Instead, the Project contemplates the construction of reservoirs to store water that might otherwise enter Lake Okeechobee, protecting the Lake from the impact of those waters.[44] (*See id.*, 46:24-47:2).

In 2000, Congress approved the CERP and authorized its implementation by Congress.[45] (*Trial Tr. Jan. 13, 2006*, 63:8-9). Congress directed restoration of the entire watershed. P.L. 106-541, § 601 (a)(5)(A) (WRDA 2000). The background for, and goals of, the CERP were summarized as follows:

> Adequately and reliably meeting water supply for all sectors is also a problem. Historically, most rainwater soaked into the ground in the region's vast wetlands. As south Florida developed, the canal network worked too effectively and drained too much water off the land too quickly. The result is that not enough

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44. One witness testified that the construction of an EAA reservoir is expected to eliminate the need to backpump for water supply purposes. (*See Trial Tr. March 2, 2006*, 24:16-19).

45. The restudy was actually completed in April 1999. (*See Trial Tr. Feb. 17, 2006*, 35:4-6).

> water is stored for all uses. Water shortages that occur today are expected to become more frequent without any changes to the water management system. Without the steps outlined in this Comprehensive Plan, conflicts over the allocation of water needed for natural, agricultural, and urban areas will only increase.
>
> * * *
>
> Overall, the recommended Comprehensive Plan will capture and store much of the water that is now lost to the ocean and gulf. This will provide enough water in the future for both the ecosystem, as well as urban and agricultural users. It will continue to provide the same level of flood protection as it does at present, if not more, for south Florida. The Comprehensive Plan is a system-wide solution for ecosystem restoration, water supply, and flood damage reduction. It is a necessary step towards a sustainable south Florida.

(*Def. Ex. 232*, Summary, iv, x).

The CERP was designed to build on the flexibility of adaptive management. (*Trial Tr. Feb. 10, 2006*, 123:2-9). It attempts to avoid past problems that resulted from changes to specific portions of the system causing unintended consequences to other parts of the system. (*Trial Tr. Jan. 11, 2006*, 75:6-19, 81:9-23; *see also Trial*

Tr. Jan. 17, 2006, 90:10-15). To avoid past mistakes, Congress established Restoration Coordination and Verification ("RECOVER"), a committee to review all of the CERP components that were developed. (*See Trial Tr. Jan. 13, 2006*, 120:16-23). RECOVER is charged with overseeing total integration of the projects. (*Trial Tr. Jan. 11, 2006*, 81:19-23; *Trial Tr. Feb. 17, 2006*, 51:6-19). There are approximately 66 individual projects contemplated by the CERP. (*Trial Tr. Jan. 20, 2006*, 151:20-22).

The CERP is being implemented through a State and federal partnership and has a projected shared cost of over $ 8.4 billion (in 1999 dollars). (*Joint Pretrial Stip.*, Attach. 5B ¶ 53). It involves the participation of 16 county governments, 122 municipalities, two tribal governments, numerous special districts, six metropolitan planning organizations, five regional planning councils, the SFWMD, five state environmental planning and regulatory agencies, and 11 federal agency managers. (*Id.*, ¶ 52).

There is no guarantee that the CERP projects will ever be implemented. (*See Trial Tr. Feb. 17, 2006*, 12:25-14:5). Plaintiffs' witness, Colonel Terry Rice, testified that many "authorizations that are provided by Congress for the Corps to implement are just simply never completed [] simply because . . . if all those things don't fall in place, it never happens." (*Id.*, 14:6-10).[46]

46. There is currently a backlog of $ 50 billion worth of projects that the Corps has been authorized to construct but upon which construction has not yet begun. (*See Trial Tr. Feb. 17, 2006*, 25:9-13, 26:18-23).

To date, very little progress has been made in constructing any of the CERP projects. (*See id.*, 17:1-14).

In 2005, Florida announced the implementation of Acceler8, a plan to expedite regional projects critical to restoration of the Everglades. Acceler8 contemplates that selected priority projects will move forward on an expedited basis. (*Trial Tr. Feb. 10, 2006*, 69:7-21; *Trial Tr. Feb. 17, 2006*, 17:17-22). There are eight projects being developed under the Acceler8 plan. (*See* https://my.sfwmd.gov/portal/page?_pageid=54,926206&_dad=portal&_schema=PORTAL&navpage=overview; *Def. Ex. 91* (marked but not admitted in evidence)). The goal of Acceler8 is to begin realizing some of the expected ecosystem benefits sooner rather than later. (*Trial Tr. Jan. 20, 2006*, 150:3-7). The State has authorized the SFWMD to issue $ 1.8 billion in bonds to support the Acceler8 plan.

It appears that part of the impetus for the implementation of the Acceler8 plan was the slow progress of the CERP projects. (*See Trial Tr. Feb. 17, 2006*, 17:17-22). There is no statute, however, that mandates completion of the Acceler8 projects. (*See id.*, 17:23-18:5).

3. *Purposes of the Lawsuit*

Throughout the course of the trial, it became apparent that Plaintiffs are not entirely certain of, and may not be in agreement on, the precise goals that they

hope to accomplish by requiring the SFWMD and/or its Director to obtain a permit for backpumping. Indeed, because the EPA does not currently issue permits for water transfers, there is no consensus on what type of permit the SFWMD and/or its Director should be required to seek, if one is required under the CWA. Accordingly, it is unclear what a NPDES permit would ultimately look like (*i.e.*, whether it would require treatment of the water, require backpumping to cease, contain a backpumping schedule, etc.). (*See, e.g., Trial Tr. Feb. 8, 2006*, 149:15-155:23; *Trial Tr. Feb. 15, 2006*, 82:2-92:13).

Notably, Plaintiffs' witness, Herbert Zebuth, indicated that he was unsure whether a permit would substantively change the responsibilities of the SFWMD with respect to backpumping. (*See, e.g., Trial Tr. Jan. 17, 2006*, 20:18-21, 28:4-18). In response to a question regarding the benefits of a NPDES permit, Mr. Zebuth stated:

> Well, I have my ideas why [NPDES permitting would be beneficial], and the reason I made that statement and the reasons are, number one, another layer of review, a Federal review that would be possibly above and beyond the political pressures that the State and Water Management District may find themselves in and, certainly, a State permit does not appear to carry much weight with the Corps of Engineers and maybe a Federal permit would, and I'm talking specifically about problems

with the implementation of the Interim Action Plan where I have been told by the Water Management District when they applied to me in writing to have the Interim Action Plan changed that the Corps said that they had to backpump when the canal stages reached 13 feet in spite of the fact that the Interim Action Plan specifically only allowed 6 points toward a total of 21 for a situation in which the canals reached 13 feet. So, a situation where one agency operating the system, I guess, believes their sovereign immunity does not require them to abide by State permits. So, an NPDES being a Federal permit, I think, might be more useful in getting that cooperation.

* * *

There are times when [the SFWMD] backpumped without the canals reaching 13 feet, but some of the other factors within that point system had generated sufficient points to reach 21. But on many, many occasions when the canal system reached 13 feet and they began backpumping, they did not have 21 points. With the Corps, let's see, not being subject to regulation by State regulatory agencies, it seems that a Federal permit, in my mind, might be more influential in allowing these operations that we're trying to achieve to be observed.

(*Id.*, 104:4-24, 109:1-8). It appears, according to Mr. Zebuth, that resolution of the suit in Plaintiffs' favor may do nothing more than provide a more effective mechanism for ensuring SFWMD compliance with its current obligations when it operates the S-2, S-3, and S-4 pumps in the future.

I. Western Projects

Defendants presented evidence regarding the existence of other water transfer projects throughout the country. Over the years, the Bureau of Reclamation[47] has designed many reclamation projects. (*See Trial Tr. Jan. 20, 2006*, 26:22-27:13). There are a multitude of such projects throughout the western United States, many, if not all, of which presumably involve water diversion. (*See Def. Ex. 280*). Defendants elicited testimony concerning some of the larger western projects.

The Central Utah Project was established by an act of Congress in 1956. (*Trial Tr. Jan. 20, 2006*, 30:9-12). The Central Utah Project includes several components that divert water from one basin to another. (*See id.*, 31:19-32:21). "[T]here are about 10 reservoirs involved with the Bonneville Unit [a component of the Central Utah Project], as well as many, many miles of canals and pipelines and tunnels to transport water from the Colorado riverside." (*Id.*, 33:4-7; *see also Def. Ex. 308*).

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47. The Bureau of Reclamation was chartered by an act of Congress in 1902. (*Trial Tr. Jan. 20, 2006*, 26:15-17).

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A small pumping plant is one component of the project. (*Trial Tr. Jan. 20, 2006*, 33:11-13).

Another project is the Colorado Big Thompson Project, which transfers water from the west side to the east side of the Continental Divide. (*See Trial Tr. Jan. 20, 2006*, 40:8-41:4). That project was also authorized by Congress. (*Id.*, 43:18-24). At times, pumps are the primary means of diverting water from the western slope of the Continental Divide to the eastern slope. (*Id.*, 41:5-15). The primary purposes of the Colorado Big Thompson Project are to provide irrigation water, to supply municipal water and to generate hydropower. (*See id.*, 42:22-43:2). The project also provides incidental flood control, although flood control is not one of the stated purposes of the project. (*See id.*, 43:3-6).

The Fryingpan-Arkansas Project provides irrigation, municipal and industrial water, seeks to promote recreation activities, serves to sustain fish and wildlife, generates hydropower and provides flood control. (*Trial Tr. Jan. 20, 2006*, 49:2-7). The project transports water through a series of conveyances and utilizes pumps in doing so. (*See id.*, 48:7-22).

Other projects throughout the western United States also involve water conveyances, typically through tunnels and ditches. (*See Def. Ex. 276; see also Trial Tr. Jan. 20, 2006*, 49:22-24). Generally, the waters that are diverted have fewer constituents than do the canal waters being pumped into Lake Okeechobee. (*See Trial Tr. Jan. 20, 2006*, 53:5-54:4). No matter how pristine they

are, however, all waters contain at least a *de minimis* level of pollutants. (*See id.*, 67:15-68:2). One witness testified that there are "thousands and thousands" of water transfer projects throughout the country. (*Id.*, 62:2-6).

In short, the evidence demonstrates that the movement of water among bodies of water is not unique to South Florida. Water managers in other parts of the country are apparently concerned about the implications of a decision here from which it could be extrapolated or argued that similar transfers may require NPDES permits. (*Trial Tr. Jan. 20, 2006*, 68:9-20).

J. Description of the SFWMD

An issue that survived summary judgment is whether the SFWMD is entitled to sovereign immunity.[48] The undersigned therefore heard testimony pertaining to the SFWMD's operations, particularly with respect to the relationship of the SFWMD with the State of Florida.

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48. An order dated November 23, 2005 [D.E. 527] determined that the director of the SFWMD could be sued in his individual capacity under the doctrine first enunciated by the Supreme Court in *Ex Parte Young*, 209 U.S. 123 (1908). However, the Order did not resolve the issue of the SFWMD's immunity, as the issue was addressed by way of summary judgment and the papers presented material facts in dispute.

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The SFWMD is one of five water management districts in Florida. The districts were established to comprehensively manage the waters of the State as well as to implement the water resource policies of the State. Fla. Stat. §§ 373.016, 373.069. The SFWMD's jurisdiction is drawn along hydrologic, as opposed to political, boundaries. (*Joint Pretrial Stip.*, Attach. 5B ¶ 4).

The DEP delegates specific duties and responsibilities to the SFWMD. (*Trial Tr. Jan. 19, 2006*, 96:14-19). Additionally, and as noted, the SFWMD acts as the State sponsor of the C&SF Project. Fla. Stat. § 373.1501.

The SFWMD is governed by a nine member board, appointed by the governor of Florida, subject to confirmation by the Florida Senate. Fla. Stat. § 373.073(1)(a). The governor has the authority to remove any SFWMD officer from office. Fla. Stat. § 373.076(2). The executive director, who is appointed by the SFWMD governing board, is responsible for the day-to-day operations of the SFWMD and implements policy. (*Trial Tr. Jan. 19, 2006*, 112:5-9; *see also* Fla. Stat. § 373.079(4)(a)).

Because the SFWMD is listed as a "major component unit" of the State of Florida in comprehensive annual financial reports (*Trial Tr. Jan. 19, 2006*, 110:15-20; *Def. Ex. 104*), it must follow very specific budget and financial reporting requirements. (*Trial Tr. Jan. 19, 2006*, 94:5-13). As such, the SFWMD

must comply with rules set out by the Government Accounting Standards Board ("GASB"). (*Id.*, 104:13-25). Some agencies that are not "arms of the state," however, must also comply with GASB guidelines. (*Id.*).

The SFWMD budgeting process spans nine months. (*Trial Tr. Jan. 19, 2006*, 123:13-124:5). All interested parties (*i.e.*, the DEP, the SFWMD, governor and legislature) participate in the process. (*Id.*). The governor has line-item veto authority over the budget. (*Id.*, 107:5-6). The governor's office also reviews the SFWMD's revenue sources. (*See id.*, 132:17-20). The budget must also be submitted to the DEP and the legislature for review and comment. (*Id.*, 107:6-9). The DEP or the legislature may provide written objections or comments to the proposed budget, to which the SFWMD must respond. (*Id.*, 107:6-9, 116:2-7). In 2006, the SFWMD had a $ 1.1 billion budget. (*Id.*, 129:24-25).

The SFWMD receives general appropriations from the State, accounting for 25 to 30 percent of its budget. (*Trial Tr. Jan. 19, 2006*, 107:3-4). In addition to general appropriations, the State provides the SFWMD with special appropriations for specific projects, bond proceeds, gas tax revenues, license plate revenues, trust fund revenues, and other revenue streams. (*Id.*, 131:8-18). State funding may be withheld from the SFWMD if it fails to comply with certain state requirements. (*Id.*, 123:7-9).

Sources of non-state funding account for 70 to 75 percent of the SFWMD budget. (*See Trial Tr. Jan. 19,*

2006, 130:16-21). These sources include ad valorem taxing, federal grants, millage rates, and agricultural privilege taxes. (*See id.*). Ad valorem sources account for approximately 40 percent of the budget. (*Id.*). The SFWMD currently collects $ 440 million in ad valorem taxes annually, representing a sharp increase over the past seven years. (*Id.*, 146:6-13). Ad valorem tax rates are set by the governing board of the SFWMD (*id.*, 142:11-15), although there is a limit placed on the ad valorem taxes that the SFWMD may collect. (*Id.*, 135:5-10).

The SFWMD also imposes millage rate taxes (*see Trial Tr. Jan. 19, 2006*, 143:2-18) and agricultural privilege taxes. (*See id.*, 130:25-131:5). Similar to SFWMD ad valorem taxes, the counties in which the SFWMD operates collect taxes on behalf of the SFWMD and transfer the money directly to the SFWMD. (*Id.*). The SFWMD may also issue general obligation bonds and revenue bonds, although it has never issued general obligation bonds in the past. (*Id.*, 135:21-136:10).

The SFWMD can sue and be sued. (*Trial Tr. Jan. 19, 2006*, 151:11-13). It carries insurance for losses to its buildings, facilities and aircraft. (*Id.*, 136:13-17). Any funds collected from the policies are paid directly to the SFWMD. (*Id.*, 149:5-9). The SFWMD also has a self-insurance fund which is reserved to pay future claims in the areas of automobile liability, workers' compensation, and general liability. (*Id.*, 136:16:137:3).

Where large judgments have been rendered against the SFWMD in the past, as in inverse condemnation

suits, the SFWMD has satisfied the judgments using State trust funds to which it has access (*see Trial Tr. Jan. 19, 2006*, 131:19-132:1) and/or land act acquisition funds provided for in the SFWMD budget. (*Id.*, 139:3-140:6). If a judgment was sufficiently substantial, the SFWMD would be forced to declare a financial emergency and would have to request additional funds from the State. (*Id.*, 141:9-19).

III. CONCLUSIONS OF LAW

For Plaintiffs to prevail on their claims, the Court must answer the following two questions in the affirmative: (1) Does the CWA require that a water transfer between water bodies, where the transfer results in the addition of a pollutant to the receiving water body, comply with the NPDES permitting program; and (2) if so, are the canals meaningfully distinct from the Lake? The Court's analysis begins with the first question, a legal question of statutory interpretation that is case-dispositive.

A. Applicability of the NPDES Permitting Scheme

1. *Introduction*

Notwithstanding the enormous resources expended, and potential implications of the result, resolution of the initial legal question[49] before the Court rests primarily upon

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49. The issue of an appropriate remedy, if any, has been only briefly addressed for the most part, although U.S. Sugar has provided more extensive commentary in its proposed findings, filed on March 29, 2006. (*See* [D.E. 596]).

the proper interpretation of a few words of the CWA. Resolution of the matter, however, has been far from a simple exercise.

The CWA prohibits "the discharge of any pollutant by any person" unless the discharge is in compliance with the CWA.[50] 33 U.S.C. § 1311. The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). A "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6). A point source is "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

The SFWMD concedes that it does not currently have, nor has it ever had, a permit for the water transfers at issue, transfers that move water from the canals to the Lake (both being "navigable waters"), through point

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50. "A "person" is defined as "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." 33 U.S.C. § 1362(5). The SFWMD and its Director therefore qualify as persons under the CWA.

sources, the S-2, S-3, and S-4 pumps. This is because, according to the SFWMD, the transfers do not require NPDES permits.

Under the quoted statutory language, a permit is required where the following five elements are present: (1) a pollutant must be (2) added (3) to navigable waters (4) from (5) a point source. *Nat'l. Wildlife Fed'n. v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982); *Nat'l. Wildlife Fed'n. v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988). The undersigned must thus determine whether the SFWMD's activities *via* the S-2, S-3, and S-4 pumps *add* a pollutant *to navigable waters* (elements one, two and three).

2. *Defendants' Arguments*

Defendants offer two arguments in support of their position that transfers of water between navigable waters do not, as a matter of law, require NPDES permits where the waters are not subjected to any intervening uses. The first position, championed primarily by the SFWMD, is that the relevant statutory language unambiguously places such transfers outside the scope of the NPDES scheme. Defendants alternatively argue that the relevant provisions are ambiguous, and a holistic approach to the statute compels the conclusion that such water transfers are regulated by means other than the NPDES permitting program.

Appendix D

a. First Argument: The Statutory Language is Unambiguous.

As stated, the CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The SFWMD concludes that permits are only required where an activity *adds* a pollutant *to navigable waters*. According to the argument, activities that move water from one navigable water to another do not result in any "*addition to navigable waters*" as they merely move water *between navigable waters*. The SFWMD contends that Plaintiffs, and some courts, have erred by focusing upon the word "addition" in a vacuum. It argues that the Court may not ignore *what the addition is "to."*

As an analogy, Defendants proffer a hypothetical law that bans the addition of wine to the United States. The ban would undoubtedly apply to the importation of wine from, for example, France or Italy. However, it would have no effect upon the movement of wine from California to Florida, as movement between states would not result in the addition of any wine to the United States as a whole.

Similarly, the SFWMD argues that while the CWA prohibits the addition of pollutants from the outside world to navigable waters, it does not prohibit transfers of pollutants between waters as the transfers do not result in a pollutant being added to the unit of *navigable waters of the United States* (although they may result in the addition of a pollutant to "*a* navigable water of

the United States"). The SFWMD maintains that if Congress had intended the statute to cover transfers between navigable waters, Congress would have required NPDES permits for the addition of a pollutant to "*any* navigable water" of the United States, or would have utilized similar language.

b. Second Argument: Because the Statute is Ambiguous, the Court Should Adopt a Holistic Approach to its Interpretation and/or Defer to the EPA Interpretation.

In the alternative, Defendants argue that the statutory provisions prohibiting discharges of pollutants without a permit are ambiguous. They urge the Court to adopt a "holistic" approach to the statute. Similarly, Defendants ask that the Court defer to the holistic interpretation of the statute undertaken by the EPA. Because the positions of Defendants and the EPA are essentially identical, the undersigned undertakes a detailed description of the rationales offered in support of the EPA's recently-issued "National Pollution Discharge Elimination System (NPDES) Water Transfers Proposed Rule" ("Proposed Rule").[51] *See* 71

51. The EPA had previously drafted a document entitled "Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers" ("Agency Interpretation") on August 5, 2005. (*See United States' Motion for Summary Judgment* [D.E. 369], Ex. 1). The Proposed Rule adopts the position taken by the EPA in its Agency Interpretation. In a recent Notice filed with the Court, the EPA advises that it

(Cont'd)

Fed. Reg. 32887. If adopted, the Proposed Rule would amend the CWA regulations. *See id.* at 32889.

The Proposed Rule explicitly excludes water transfers from regulation under the NPDES permitting program. 71 Fed. Reg. 32887. It defines "water transfer" as "an activity that conveys waters of the United States to another water of the United States without subjecting the water to intervening industrial, municipal, or commercial use." 71 Fed. Reg. 32889. The EPA cites the statutory language and structure, as well as the legislative history of the CWA, in support of the Proposed Rule.

The Proposed Rule espouses a "holistic" approach to interpreting the statute. *See id.* ("Looking at the statute as a whole is necessary to ensure that the analysis here is consonant with Congress' overall policies and objectives in the management and regulation of the nation's water resources."). The EPA observes that, in enacting the CWA, Congress explicitly stated it did not intend to encroach upon the states' prerogatives with respect to the development and use of land and water resources. *See id.* at 32890 (citing 33 U.S.C. § 1251(b)). Likewise, the Proposed Rule emphasizes that Congress specifically provided that the CWA should not interfere with each state's ability to allocate quantities of water

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(Cont'd)

expects to take final action on the Proposed Rule by the spring of 2007. (*See* [D.E. 635]). This Order focuses on the Proposed Rule, as opposed to the Agency Interpretation.

within its jurisdiction. *See id.* (citing 33 U.S.C. § 1251(g)). The EPA states that

> [w]ater transfers are an essential component of the nation's infrastructure for delivering water that users are entitled to receive under State law. Because subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocations of water rights, this section provides additional support for the Agency's interpretation that, absent a clear Congressional intent to the contrary, it is reasonable to read the statute as not requiring NPDES permits for water transfers.

Id.

The EPA also finds it relevant that, although the statute does not specifically speak to whether water transfers are subject to the NPDES permitting scheme, the only reference in the statute to flow diversion activities is in a section that addresses nonpoint sources of pollution. Pursuant to 33 U.S.C. § 1314(f), Congress instructed the EPA to develop information relating to the control of pollution resulting from "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." Although, as recognized in the Proposed Rule, the provision does not *exclusively*

address nonpoint sources, it is *primarily concerned* with nonpoint sources of pollution. *See* 71 Fed. Reg. 32890. The EPA concludes that when the statute is read in conjunction with the other provisions pertaining to the states' authority over water management, it is apparent that "Congress was aware that there might be pollution associated with water management activities, but chose to defer to comprehensive solutions developed by State and local agencies for controlling such pollution." *Id.*

The EPA justifies its Proposed Rule by resort to "the overall structure of the statute." *Id.* at 32891.

> In several important ways, water transfers are unlike the types of discharges that were the primary focus of Congressional attention in 1972. Discharges of pollutants covered by section 402 are subject to "effluent" limitations. Water transfers, however, are not like effluent from an industrial, commercial or municipal operation. Rather than discharge effluent, water transfers release one water of the U.S. into another.
>
> The operators of water control facilities are generally not responsible for the presence of pollutants in the waters they transport. Rather, those pollutants often enter "the waters of the United States" through point and nonpoint sources located far from those facilities and beyond control of the project

> operators. Congress generally intended that pollutants be controlled at the source whenever possible. *See* S. Rep. No. 92-414, p. 77 (1972) (justifying the broad definition of navigable waters because it is "essential that discharge of pollutants be controlled at the source"). The pollutants in transferred waters are more sensibly addressed through water resource planning and land use regulations, which attack the problem at its source. . . . Congress acknowledged this when it directed Federal agencies to co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water sources.

Id.

The EPA also cites to the legislative history of the CWA in support of its position. It notes that the legislature sought to "to insure that State [water] allocation systems are not subverted." *Id.* (citing 3 Congressional Research Serv., U.S. Library of Congress, Serial No. 95-14, A Legislative History of the Clean Water Act of 1977, at 532 (1978)) (citation omitted). Moreover, in addressing 33 U.S.C. § 1314(f), the provision pertaining to flow diversion, the House Committee Report stated that it expected the EPA to be "diligent in [the] gathering and distribution of the guidelines for the identification of nonpoint sources and the information on processes, procedures, and methods

for control of pollution from such nonpoint sources as . . . *natural and manmade changes in the normal flow of surface and ground waters.*" *Id.* (citing H.R. Rep. No. 92-911, at 109 (1972)) (emphasis added).

Finally, the Proposed Rule cites a House Committee Report statement that:

> [I]n some States water resource development agencies are responsible for allocation of stream flow and are required to give full consideration to the effects on water quality. To avoid duplication, the Committee believes that a State which has an approved program for the handling of permits under section 402, and which has a program for water resource allocation should continue to exercise the primary responsibility in both of these areas and thus provide a balanced management control system.

Id. (citing H.R. Rep. No. 92-911, at 96 (1972)).

The parties do not dispute that, if accepted, the Proposed Rule, and the EPA's rationale in support thereof, should result in the denial of the relief Plaintiffs seek.

Appendix D

3. *Plaintiffs' Arguments*

Plaintiffs maintain that the CWA unambiguously prohibits any addition of a pollutant to navigable waters without a permit. Theirs is a straightforward proposition. They argue that an "addition" of a pollutant takes place whenever a pollutant is added to a navigable water from anywhere outside of the receiving body of water, *including from another water body*. According to Plaintiffs, Defendants essentially ask the Court to draft an exception into the statute where Congress has not done so.

As Plaintiffs do not find any ambiguity in the statutory prohibition of *any addition* of *any pollutant* without a NPDES permit, Plaintiffs find Defendants' "holistic" arguments to be largely irrelevant. In other words, Plaintiffs argue that Congress has specifically and unambiguously mandated that certain activities be subject to the NPDES permitting scheme. While Congress certainly espoused other programs and policies in enacting the CWA, none of these other considerations can overcome the clear language of the statute. Moreover, Plaintiffs identify other provisions in the statute suggesting that Congress intended to control pollution and restore the nation's waters to the maximum extent possible. *See, e.g.*, 33 U.S.C. § 1251(a)(1) ("[I]t is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985.").

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4. *Relevant Case Law*

Before embarking upon a statutory analysis, it is both necessary and helpful to examine the manner in which other courts have addressed similar issues in the past. Unfortunately, no consensus has been reached among courts that have addressed these issues.

a. The S-9 Decision

Any survey of the law must necessarily begin with the Supreme Court's pronouncement in the *S-9 Case*. *See So. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). In the *S-9 Case*, the Supreme Court considered the question, nearly identical to the one considered here,[52] of whether the SFWMD was required to obtain a NPDES permit for its water transfer activities. As noted, the S-2, S-3, and S-4 are not the only pumps operated by the SFWMD. The Supreme Court case concerned the SFWMD operation of the S-9 pump station.

The *S-9 Case* more particularly involved the pumping of canal water from the C-11 Canal[53] into a water conservation area known as "WCA-3." *Id.* at 100. The pumping activities served to maintain the water table in WCA-3 at a level significantly higher than the

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52. Indeed, the case was brought by FOE and Miccosukee, two of the Plaintiffs here.

53. The area lies to the south of Lake Okeechobee.

water level in the lands drained by the C-11 canal to the east. *Id.* Accordingly, "[a]bsent human intervention, that water would simply flow back east, where it would rejoin the waters of the canal and flood the populated areas of the C-11 basin." *Id.* at 100-01. Water was prevented from flooding the populated areas within the C-11 basin by levees that separated WCA-3 from the remainder of the basin. *Id.* at 101.

The *S-9 Case* came before the Court after the district court granted the plaintiffs' motion for summary judgment against the SFWMD, holding that the discharges required a NPDES permit. *See Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, Case No. 98-6056-Civ, 1999 WL 33494862 (S.D. Fla. Sept. 30, 1999). The district court's decision was affirmed by the Eleventh Circuit. *See Miccosukee Tribe of Indians of Florida v. So. Florida Water Mgmt. Dist.*, 280 F.3d 1365 (11th Cir. 2002).

In vacating the decision, the Court held that the water transfer activities only required a NPDES permit if they transferred water (and pollutants) from one body of water to another *meaningfully distinct* body of water. Alternatively stated, "[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110 (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 492 (2d Cir. 2001)). The Court found that the district court had prematurely concluded that the C-11 Canal was "meaningfully distinct" from the WCA-3.

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The Court specifically held that the record contained evidence that: (1) because of the porosity of the soil, especially in the absence of the levees, water would flow easily between ground and surface waters; (2) the levees would continually leak, allowing for "significant mingling" of the waters in question; and (3) if the pump station was shut down, flooding would occur and the waters could, over time, essentially become one body of water. *See id.* at 110-11. Having found that the record was not sufficiently developed to make a determination as to whether the bodies of water were "meaningfully distinct," the Court declined to adopt a standard by which courts should make the determination. *See id.* at 111. Accordingly, it expressed no opinion on the accuracy of the district court's statement that a permit is required whenever a pollutant would not enter the receiving body of water but for the actions of the point source. *See id.*

In considering the case, the Court addressed two legal arguments that are relevant to the present dispute. First, the Court rejected the argument that NPDES permits are not required where the entity that controls the point source does not add any pollutant to the water. It held that the CWA definition of point source "makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters, which are, in turn, defined as the waters of the United States." *Id.* at 105 (internal quotations and citation omitted).

Next, and notwithstanding the fact that it had not granted certiorari on the issue, the Court briefly

addressed the "unitary waters" argument that Defendants also assert here. The Court ultimately declined to resolve the question as it had not been previously raised by the parties. However, the Court did not, at first glance, view the "unitary waters" theory favorably. It noted that "several NPDES provisions might be read to suggest a view contrary to the unitary waters approach." *Id.* at 107.

One problem identified by the Court was that

> under the Act, a State may set individualized ambient water quality standards by taking into consideration "the designated uses of the navigable waters involved." 33 U.S.C. § 1313(c)(2)(A). Those water quality standards, in turn, directly affect local NPDES permits; if standard permit conditions fail to achieve the water quality goals for a given water body, the State must determine the total pollutant load that the water body can sustain and then allocate that load among the permit holders who discharge to the water body. § 1313(d). This approach suggests that the Act protects individual water bodies as well as the "waters of the United States" as a whole.

Id. The Court further opined that:

> 40 CFR § 122.45(g)(4) (2003) allows an industrial water user to obtain "intake credit"

> for pollutants present in water that it withdraws from navigable waters. When the permit holder discharges the water after use, it does not have to remove pollutants that were in the water before it was withdrawn. There is a caveat, however: EPA extends such credit "only if the discharger demonstrates that the intake water is drawn from the same body of water into which the discharge is made." The NPDES program thus appears to address the movement of pollutants among water bodies, at least at times.

Id. at 107-08.

It is thus clear that the Court cast aspersions on the "unitary waters" theory. It is not clear, however, whether the theory was presented to the Court in the same light as it has been presented here.[54]

b. Other Relevant Case Law

Because the Supreme Court did not reach the issue of whether the transfer of one navigable water to

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54. In any event, "before relying on a formulation of law in a prior opinion, we [the courts] must determine whether it was holding or dictum. We must make that inquiry even when the prior court was the Supreme Court. If a rule was declared only in dictum, the question remains undecided, and we have a constitutional duty to make our own determination of the answer." Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1282 (2006).

another navigable water (where the water that is being transferred contains a pollutant) constitutes the "addition" of a pollutant, the parties have directed the Court to decisions of the courts of appeals in support of their arguments. Defendants ask the Court to follow the reasoning set forth in *National Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982), and *Nat'l. Wildlife Federation v. Consumers Power Company*, 862 F.2d 580 (4th Cir. 1988), in which the courts found that the activities in question did not require NPDES permits. Conversely, Plaintiffs rely upon the more recent holdings in *Dubois v. United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996), *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ("*Catskill I*"), *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77 (2d Cir. 2006) ("*Catskill II*"), and *Miccosukee Tribe of Indians v. S. Florida Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002),[55] in which courts found that the transfers between navigable waters required permits.

The circuit court opinions have largely been presented as being inconsistent with one another. And yet while the courts may have used inconsistent language in reaching their conclusions, the cases are also distinguishable from one another on their facts. *Gorsuch* involved a dam that released water from a reservoir to a downstream water. Similarly, *Consumers*

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55. As already mentioned, the decision was vacated by the Supreme Court in the *S-9 Case*.

Power involved a hydroelectric facility that withdrew water and later released it into the same body of water from which the water was initially withdrawn. The cases Plaintiffs rely upon, *Dubois* and *Catskill I* and *II*, involved water transfers from one body of water to other, clearly distinct and wholly separate bodies of water. Thus, the circuit court holdings are not in direct conflict with each other and are certainly reconcilable.

The Gorsuch holding was based largely upon the court's deference to the EPA position that dams were not subject to the NPDES permitting program. *See Gorsuch*, 693 F.2d at 166-70. The court further deferred to the EPA position that low dissolved oxygen and supersaturation, which characterized the released water, were not "pollutants" within the meaning of the CWA. *See id.* at 174. The analysis is not pertinent to the question before the Court.

Of importance to this case is the following position of the EPA, which *was* adopted by the *Gorsuch* court:

> [A]ddition from a point source occurs only if the point source itself physically introduces a pollutant into water from the outside world. In its view, the point or nonpoint character of pollution is established when the pollutant first enters navigable water, and does not change when the polluted water later passes through the dam from one body of navigable water (the reservoir) to another (the downstream river).

Id. at 175. To the extent that the court held that a source must introduce a pollutant into the waters of the United States to be considered a "point source," that position was rejected by the Supreme Court in the *S-9 Case*. However, the holding remains relevant to the extent that it found that the movement of a pollutant between navigable waters does not constitute an "addition" to the receiving water.

In *Consumers Power*, pumps moved water from Lake Michigan into a manmade reservoir. *Consumers Power*, 862 F.2d at 581. The water was subsequently discharged into the lake. *Id.* The discharged waters contained, among other things, fish that had died as a result of the pumping process. *Id.* at 583. There was no dispute that the dead fish were considered pollutants under the CWA. *Id.* In rejecting the plaintiff's position that the activity required a permit, the court held that

> [f]or the Ludington facility, the fish, both dead and alive, always remain within the waters of the United States, and hence cannot be added. EPA's § 402 treatment of the Ludington facility's wastewater, far from evincing irrational or arbitrary agency behavior, represents a reasonable distinction between those pollutants already in the water moved and transformed by the essential operation of a hydroelectric power dam and those waste products "added" to the water by tangential processes in generating electricity.

Id. at 586.

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In *Dubois*, the First Circuit was required to determine whether snowmaking activities that withdrew water from both the Pemigewasset River and Loon Pond, and ultimately deposited all of the waters into Loon Pond, required a NPDES permit. *Dubois*, 102 F.3d at 1275. Although there was some factual dispute as to whether the process introduced new pollutants into the water, *see id.* at 1296 n. 29, it was clear that, at a minimum, the discharged water included pollutants that were initially present in the Pemigewasset River. *See id.*

The court began its analysis by noting that "[t]he most important component of the [CWA] is the requirement that an NPDES permit be obtained." *Id.* at 1294 (citing *United States v. Commonwealth of Puerto Rico*, 721 F.2d 832, 834 (1st Cir. 1983); 33 U.S.C. § 1342(1994)). *Dubois* explicitly rejected the district court's reasoning that "the intake water from the East Branch of the Pemigewasset River and the water in Loon Pond are all part of a singular entity, the waters of the United States, [meaning that] that the bodies of water are not to be considered individually in this context." *Id.* at 1296 (internal quotations and citation omitted).

Bearing directly upon the question presented here, the First Circuit found that there was nothing in the CWA evidencing a congressional intent to distinguish between unrelated, but hydrologically connected, bodies of water. *Id.* at 1298. The court distinguished the case from *Gorsuch* (where a dam accumulated "the same" water) and *Consumers Power* (where a facility stored

water from one source in a different place). *Id.* at 1299. The court concluded:

> We hold that the Pemigewasset River and Loon Pond are two distinct "waters of the United States," and that the proposed transfer of water from one to the other constitutes an "addition." Where, as is undisputed here, the discharge is through a point source and the intake water contains pollutants, an NPDES permit is required. The Forest Service's determination to the contrary was arbitrary and capricious and not in accordance with law. *See* 5 U.S.C. § 706(2)(A).

Id.

Finally, the Second Circuit issued two decisions in the *Catskill* case. The first decision was issued prior to the Supreme Court ruling in the *S-9 Case*. After the Supreme Court rendered its decision, the Second Circuit reconsidered its holding in *Catskill II*. *Catskill II* upheld the court's original decision that the NPDES permitting program was applicable to transfers between two bodies of water.

In reaffirming its prior decision, the Second Circuit addressed, and rejected, many of the same arguments presented here by Defendants. Indeed, the Second Circuit received *amicus curiae* briefs, as the Court did here, from western states that were concerned about

the implications of the court's decision on their ability to allocate water. Unimpressed by New York City's "holistic" arguments, the court found as follows:

> In the end, while the City contends that nothing in the text of the CWA supports a permit requirement for interbasin transfers of pollutants, these "holistic" arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute, simply overlook its plain language. NPDES permits are required for "the discharge of any pollutant," 33 U.S.C. § 1311(a), which is defined as "any addition of any pollutant to navigable waters from any point source," *id.* § 1362(12). It is the meaning of the word "addition" upon which the outcome of *Catskills I* turned and which has not changed, despite the City's attempts to shift attention away from the text of the CWA to its context. In *Catskills I*, we pointed out that complex statutes often have seemingly inconsistent goals that must be balanced. 273 F.3d at 494. The CWA seeks to achieve water allocation goals as well as to restore and maintain the quality of the nation's waters. The City and the EPA would have us tip the balance toward the allocation goals. But in honoring the text, we adhere to the balance that Congress has struck and remains free to change.

Catskill II, 451 F.3d at 84-85.

5. *Analysis*

Having reviewed the parties' arguments and surveyed the most relevant case law, the Court now turns to its own analysis. The legal question before the Court is primarily one of statutory construction. "Statutory construction . . . is a holistic endeavor." *Smith v. United States*, 508 U.S. 223, 233 (1993) (quoting *United Sav. Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988)). Accordingly, the Supreme Court has long held that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy." *United States v. Boisdore's Heirs*, 49 U.S. 113, 122 (1850); *Regions Hosp. v. Shalala*, 522 U.S. 448, 460 n. 5 (1998); *see also United States Nat'l. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (noting that the maxim has been quoted "in more than a dozen cases"). Thus,

> [w]hen interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature.

Kokoszka v. Belford, 417 U.S. 642, 650 (1974) (internal quotations and citations omitted).

Therefore, and notwithstanding the arguments presented by the parties, the Court is not faced with the choice of whether to take a narrow versus a holistic view of the statute. Indeed, it would be error to employ anything but a holistic approach, as individual statutory provisions are not meant to be read in a vacuum. But even when taking a "holistic approach," a court must begin its analysis with the language of the statute. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (*citing Bailey v. United States*, 516 U.S. 137, 144 (1995)). More specifically, because Plaintiffs assert that the SFWMD's activities require a NPDES permit, the Court begins with the statutory provisions pertaining to NPDES permits.

The CWA prohibits "the discharge of any pollutant by any person" unless the discharge is in compliance with the CWA. 33 U.S.C. § 1311. The CWA defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). Finally, "navigable waters" are "the waters of the United States, including the territorial seas." 33 U.S.C. § 1362(7). The word "addition" is not defined in the CWA.

When a term is not defined by statute, courts must construe the term "in accordance with its ordinary or natural meaning." *S.D. Warren Co. v. Maine Bd. of*

Envtl. Prot., 126 S. Ct. 1843 (2006) (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). "Addition" is defined as the "joining of one thing to another." Webster's Third International Dictionary Unabridged, p. 24 (1993). Although the EPA states "that it is reasonable to interpret 'addition' as not generally including the mere transfer of waters from one water of the U.S. to another," it offers no sound explanation in support of its strained definition of the term. 71 Fed. Reg. 32891. Notwithstanding Defendants' protestations to the contrary, it is evident that "addition . . . to the waters of the United States" contemplates an addition from anywhere outside of the receiving water, including from another body of water. *See S-9 Case*, 280 F.3d at 1368 ("[I]n determining whether pollutants are added to navigable waters for purposes of the CWA, the receiving body of water is the relevant body of navigable water."); *Catskill II*, 451 F.3d at 84 (finding that defendants' arguments "simply overlook [the CWA's] plain language").

Far from being inconsistent with the "structure" of the CWA, requiring permits for backpumping is consistent with the CWA goal of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. 33 U.S.C. § 1251(a). Indeed, Congress set the ambitious and as yet unachieved goal "that the discharge of pollutants into the navigable waters be eliminated by 1985." *Id.* § 1251(a)(1). Courts have recognized that the NPDES permitting scheme represents the most important tool in achieving the goal of cleaning up the

nation's waters. *Am. Iron and Steel Inst. v. EPA*, 115 F.3d 979, 990 (D.C. Cir. 1997) ("The centerpiece of the CWA is the NPDES permitting program."); *Dubois*, 102 F.3d at 1294 ("The most important component of the [CWA] is the requirement that an NPDES permit be obtained."); *United States v. Com. of Puerto Rico*, 721 F.2d at 834 ("The linchpin of the [CWA] is the NPDES permit process.").

The discussion in *Gorsuch* of the primacy of the NPDES program is instructive:

> There is indeed some basis in the legislative history for the position that Congress viewed the NPDES program as its most effective weapon against pollution. Prior to 1972, federal water pollution law had required the states, under EPA oversight, to develop water quality standards and then limit industrial and municipal discharges so as to meet those standards. This system proved inadequate. It was costly, slow, and complicated to determine the effluent limits needed to maintain water quality. Many states did not set effluent limits and enforcement was all but nonexistent. The 1972 Act made technology-based effluent limits, rather than water quality standards, "the basis of pollution prevention and elimination" because they were "the best available mechanism to control water pollution."

Gorsuch, 693 F.2d at 175-76 (footnotes and internal citations omitted).

Moreover, as both the Supreme Court and First Circuit noted, a holding that the NPDES program does not apply to water transfers would result in a scheme where a person could pump the most polluted waters into the most pristine waters without a NPDES permit. *See S-9 Case*, 541 U.S. at 106; *Dubois*, 102 F.3d at 1297. Defendants presented evidence that other programs established by the states and/or the CWA would prevent such an absurd result. However, evidence introduced at trial called into question the effectiveness of many alternative regulatory regimes, and, as noted, Congress apparently intended that the NPDES program serve as its primary tool whenever possible.

The undersigned does not suggest that the scope of the NPDES permitting scheme may be settled by reference to general policies and the importance of the NPDES program within the CWA scheme. However, Defendants have suggested that Plaintiffs' and other courts' natural reading of the "addition to navigable waters" provision is at odds with the structure of the statute. Hopefully, the preceding analysis demonstrates that far from being inconsistent with the structure of the CWA, there are many aspects of the CWA that wholeheartedly support Plaintiffs' interpretation. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979) ("It is clear from the legislative history Congress would have regulated so-called nonpoint sources if a workable method could have been derived."); *Shanty Town Assoc. Ltd. P'ship. v. EPA*, 843 F.2d 782, 791 (4th Cir. 1988) ("[T]he [FWCPA's] legislative history makes clear that this omission [of direct federal

regulation of nonpoint source pollution] was due not to Congress' concern for state autonomy, but . . . to its recognition that the control of nonpoint source pollution was so dependent on . . . site-specific factors. . . that its uniform federal regulation was virtually impossible.").

Having found that the relevant statutory language contemplates the permitting of transfers between navigable waters, and that the statute and its legislative history provide a considerable amount of support for that conclusion, the undersigned turns to whether the conclusion is clearly inconsistent with the structure of the CWA (*i.e.*, whether a "holistic" approach compels a different conclusion).

a. Federalism Concerns

Defendants' primary argument is that Congress clearly intended that the CWA not encroach upon the states' ability to allocate water within their jurisdictions. It is beyond dispute that the CWA has, to the maximum extent possible, left water allocation decisions to the states. For example, the CWA states that

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any

> State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g). Congress also emphasized that the CWA should not "be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370(2).

Senator Malcolm Wallop, who sponsored the section 101(g) amendment (often referred to as the "Wallop Amendment"), described the purpose of the amendment as follows:

> The requirements of section 402 and 404 permits may incidentally affect individual water rights. . . . It is not the purpose of this amendment to prohibit those incidental effects. It is the purpose of this amendment to insure that State allocation systems are not subverted, and that effects on individual rights, if any, are prompted by legitimate and necessary water quality considerations. This amendment is an attempt to recognize the historic allocation rights contained in State constitutions. It is designed to protect historic rights from mischievous abrogation by those who would use an act, designed solely to protect water quality and wetlands, for other

> purposes. It does not interfere with the legitimate purposes for which the act was designed.

3 Leg. Hist. 532 (Senate Debate, Dec. 15, 1977).

Defendants concede that the Wallop Amendment does not specifically speak to whether backpumping and similar practices are covered under the NPDES permitting scheme. However, they argue that because backpumping and like activities are part and parcel of a state's ability to allocate quantities of water within its jurisdiction, it is unlikely that Congress intended to subject such activities to the NPDES permitting program. Alternatively stated, Defendants contend that requiring permits will not merely have an incidental effect upon states' allocation prerogatives, but will effectively eliminate states' control over their own waters.

The Supreme Court has emphasized that "[s]ections 101(g) and 510(2) preserve the authority of each State to allocate water quantity as between users; *they do not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water allocation.*" *PUD No. 1 of Jefferson County v. Washington Dep't. of Ecology*, 511 U.S. 700, 720 (2004) (emphasis added). *See also United States v. Akers*, 785 F.2d 814, 821 (9th Cir. 1986) ("A fair reading of the statute as a whole makes clear that, where both the state's interest in allocating water and the federal government's interest in protecting the environment

are implicated, Congress intended an accommodation. Such accommodations are best reached in the individual permit process."); *Riverside Irrigation Dist. v. Andrews*, 568 F. Supp. 583, 589 (D. Colo. 1983) ("[C]ongress did not intend to limit § 404's scope where it might affect state water-rights law when it enacted § 101(g).").

In the *S-9 Case*, the parties argued that "to require an NPDES permit for every engineered diversion of one navigable water into another, thousands of new permits might have to be issued, particularly by western States, whose water supply networks often rely on engineered transfers among various natural water bodies." *S-9 Case*, 541 U.S. at 108. The Supreme Court did not dismiss the argument out of hand, instead stating that

> [i]t may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. § 1251(g). On the other hand, it may be that such permitting authority is necessary to protect water quality, and that the States or EPA could control regulatory costs by issuing general permits to point sources associated with water distribution programs.

Id. (citations omitted).

The Supreme Court thus suggested that in order to prevail on their federalism argument, Defendants must (1) demonstrate that the water transfers are allocative in nature; and (2) show that permitting the transfers would prohibitively raise states' costs of water distribution. Here, Defendants have failed to demonstrate either element.

At least since the implementation of the IAP, the vast majority of backpumping has been for flood control purposes. Backpumping typically occurs, as a matter of course, whenever the water levels in the canals reach a pre-determined elevation. Indeed, the SFWMD only backpumps for water supply purposes under very limited circumstances. Pumping massive quantities of water into the Lake after heavy rains is not the type of activity contemplated by the Wallop Amendment.

This is not to suggest that backpumping has *no impact* on the State's allocation decisions. Water that reaches Lake Okeechobee may later be used to supply water for drinking or irrigation. Nevertheless, the Supreme Court and Congress have made clear that such incidental effects are both anticipated and acceptable aspects of the NPDES permitting program. *See PUD No. 1 of Jefferson County*, 511 U.S. at 520; 3 Leg. Hist. 532 (Senate Debate, Dec. 15, 1977).

The undersigned is mindful that Defendants, particularly the United States, ask that the broader implications of any decision here be carefully considered. Thus, although backpumping through the S-2, S-3, and

S-4 pump stations may not have a significant impact on Florida's water allocation activities, permitting analogous activities could potentially cripple water management activities throughout the country, particularly in the West. While it may not be appropriate to turn a blind eye to any broader implications this decision may have, this case must be decided based upon the particular controversy at issue.[56] The evidence concerning water transfers in western states demonstrates that there are thousands of water transfers throughout the United States. It does not demonstrate, however, that those activities are essentially identical to the SFWMD's backpumping activities. It would be inappropriate to determine whether backpumping requires a permit by resorting to the potential impact of such a decision on other water transfers — water transfers about which the Court neither has a complete record nor has any authority to opine.[57]

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56. As Second Circuit Judge Pierre N. Leval noted in his recent article, *Judging Under the Constitution: Dicta About Dicta*, "[t]he constitutional function of the courts is to adjudicate — to decide cases. The Constitution does not explicitly grant to the courts the power to make law." 81 N.Y.U. L. Rev. at 1259. That right is clearly reserved to the legislative branch, and the decision reached here by no means applies to or binds other parties other than those present.

57. Many of the considerations that counsel against the issuance of advisory opinions also counsel against the Court emphasizing the potential effects of its statutory interpretation upon water transfers in other parts of the country, transfers

(Cont'd)

Even if the Court were to find that the SFWMD's backpumping implicated water allocation considerations that are the focus of sections 101(g) and 510(2) and/or looked beyond the transfers at issue here, the record does not support Defendants' implicit argument that subjecting water transfers to NPDES permitting would prohibitively raise a state's costs of water distribution. The NPDES permitting program does not require the total elimination of all pollutant discharges to navigable waters. The Court wholeheartedly agrees with the Second Circuit's finding that "the flexibility built into the CWA and the NPDES permit scheme . . . will allow federal authority over quality regulation and state authority over quantity allocation to coexist without materially impairing either." *Catskill II*, 451 F.3d at 85 (footnote omitted); *see also id.* at 87 ("While we recognize the incremental administrative burden our interpretation entails, we have little doubt that it nevertheless permits the City to deliver drinking water

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(Cont'd)

involving variables that are not present here. *See United States v. Fruehauf*, 365 U.S. 146, 157 (1961) ("Such opinions [advisory opinions], such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests, we have consistently refused to give.") (citations omitted). Nothing in the Court's decision will preclude parties who represent other states' water interests from pursuing their day in court.

to its citizens while furthering the CWA's goal to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'") (citation omitted). In support of its conclusion, the Second Circuit engaged in a detailed and well-reasoned discussion of the flexibility that is part and parcel of the NPDES permitting scheme. *See id.* at 85-86.

Any argument concerning the prohibitive costs of permitting water transfers is further undermined by the fact that other states, such as Pennsylvania, subject analogous water transfers to NPDES permitting. *See S-9 Case*, 541 U.S. at 109. Defendants have not presented any evidence as to why the water transfers in Pennsylvania are more amenable to permitting than are the water transfers in Florida or other states.

The states' primacy in allocating water represents one of many goals espoused by the CWA. Another policy of the CWA is the reduction of pollution in the nation's waters through the NPDES permitting process. The two goals are neither inconsistent nor in conflict here.

b. The Statute Does Not Contemplate that Pumps are Nonpoint Sources.

Defendants argue that flow diversion facilities such as the pump stations are generally considered to be nonpoint sources under the CWA. Again, the CWA requires the EPA to issue information pertaining "to processes, procedures, and methods to control pollution resulting from changes in the movement, flow, or

circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or *flow diversion facilities*." 33 U.S.C. § 1314(f)(2)(F) (emphasis added). The provision is found in a section of the CWA that concerns nonpoint sources of pollution. *See* 33 U.S.C. § 1314(f); *S-9 Case*, 541 U.S. at 106.

In enacting section 1314(f)(2)(F), Congress implicitly recognized that many flow diversion facilities would not constitute "point sources" under the CWA. Therefore, these facilities are not subject to the NPDES permitting program. *See Gorsuch*, 862 F.2d at 587 ("Congress apparently intended that pollution problems caused by dams and other flow diversion facilities are generally to be regulated by means other than the NPDES permit program."). Indeed, it would defy logic to conclude that Congress included flow diversion facilities in a section of the CWA addressing nonpoint sources if all flow diversion facilities are also to be considered point sources of pollution under the CWA.

Plaintiffs, however, do not contend that all flow diversion facilities must receive a NPDES permit, but merely that where a flow diversion facility transfers water from one body of water to another, it is a point source that requires a NPDES permit. The Supreme Court has observed that "§ 1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition." *S-9 Case*, 541 U.S. at 106. The

undersigned fully concurs with the position taken by the EPA in *Gorsuch*, that section 1314(f)(2)(F)

> reflects congressional understanding that some dam-induced water quality problems are nonpoint source pollution (thus it would be improper to treat all dam-induced water problems as point source pollution), but does not indicate which dam-caused problems are nonpoint pollution (thus, the section does not preclude a finding that any particular pollution problem involves a point source of pollutants).

Gorsuch, 693 F.2d at 169.

Some, if not most, flow diversion facilities will result in pollution problems that will only be addressed by nonpoint source programs. The conclusion, however, does not suggest that other flow diversion facilities, such as the SFWMD pump stations, are not to be regulated as point sources under the NPDES program.

c. Deference to EPA

The EPA's recently-issued Proposed Rule seeks to clarify that transfers between navigable waters, such as backpumping, are not subject to NPDES permitting. Congress has charged the EPA with administering the permit program (although states may also administer NPDES programs so long as they comply with certain conditions). *See* 33 U.S.C. § 1342. Thus, Defendants ask that the Court defer to the EPA position.

The parties dispute the precise level of deference that the Court should give to the EPA interpretation. Defendants contend that, even if it is not entitled to full *Chevron* deference, the Proposed Rule is entitled to more deference than is the earlier Agency Interpretation. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001). Whether the Court affords the level of deference enunciated in *Chevron* or in *Skidmore*,[58] or any level of deference in between, a court must "first ask whether congressional intent is clear." *Wilderness Watch & Pub. Employees for Envtl. Responsibility v. Mainella*, 375 F.3d 1085, 1091 (11th Cir. 2004) (citation omitted). If Congress' intent is clear and unambiguous, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* (citing *Chevron*, 467 U.S. at 842-43). Congressional intent is examined by resort to the plain language of the statute, language that is to be read in the context of the entire statutory scheme. *Id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).

The Eleventh Circuit was faced with an analogous situation in *Alabama Power Co. v. United States Dep't. of Energy*, 307 F.3d 1300 (11th Cir. 2002). In *Alabama Power*, the Eleventh Circuit noted that the level of deference it should properly afford the Department of Energy's statutory interpretation was unclear.

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58. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Id. at 1312. Nonetheless, because it found the statute to be clear on the issue, it held that "even if Chevron deference does apply, the Department's interpretation is not saved." *Id.* at 1312-13. Here, for the reasons outlined in Section II.B.5, the undersigned finds that the statute is unambiguous. No agency interpretation, or court order for that matter, can alter the unambiguous congressional intent expressed in a statute and the Court thus rejects the interpretation proposed by the EPA.

6. *Conclusion*

Ultimately, "[t]he CWA seeks to achieve water allocation goals as well as to restore and maintain the quality of the nation's waters." *Catskill II*, 451 F.3d at 84-85. Notwithstanding Defendants' proposed construction, the Court must adhere "to the balance that Congress has struck and remains free to change." *Id.* at 85. Accordingly, water transfers between distinct water bodies that result in the addition of a pollutant to the receiving navigable water body are subject to the NPDES permitting program.

B. The Canals and the Lake are Meaningfully Distinct.

Of course, the determination that water transfers between navigable waters are subject to the NPDES permitting program does not end the Court's inquiry. As the Supreme Court observed in the *S-9 Case*,

although a water transfer may transport pollutants, a NPDES permit is only required if the transfer moves pollutants from one body of water to another, *meaningfully distinct* body of water. In keeping with the bowl of soup analogy (*see S-9 Case*, 541 U.S. at 109-110 (quoting *Catskill I*, 273 F.3d at 492)), the bulk of the evidence presented by the parties concerned whether the canals and the Lake should be viewed as one large bowl of soup or as two separate bowls of soup.

In the *S-9 Case*, the Supreme Court vacated the district court's judgment after finding that, even if the district court had applied the proper test to determine whether two bodies of water are meaningfully distinct, it did so prematurely. *See id.* at 110-11. The Supreme Court so held notwithstanding the undisputed fact that waters were being artificially pumped against gravity and stored in the WCA-3 at unnaturally high levels. Thus, in the absence of the pumps, and in the short-term, the water from the C-11 Canal would not reach the WCA-3. That the Supreme Court nevertheless found that summary judgment was inappropriate teaches that in determining whether two waters are meaningfully distinct, a court should look beyond whether two water bodies are physically distinct at present.

Similarly, in analyzing whether a pollutant would not have entered a body of water but for a water diversion, the Supreme Court called for, at a minimum, a robust "but for" analysis. In the *S-9 Case*, the Supreme Court stated:

> Although C-11 and WCA-3 are divided from one another by the L-33 and L-37 levees, that line appears to be an uncertain one. Because Everglades soil is extremely porous, water flows easily between ground and surface waters, so much so that "[g]round and surface waters are essentially the same thing." . . . C-11 and WCA-3, of course, share a common underlying aquifer. . . . Moreover, the L-33 and L-37 levees continually leak, allowing water to escape from WCA-3. This means not only that any boundary between C-11 and WCA-3 is indistinct, but also that there is some significant mingling of the two waters; the record reveals that even without use of the S-9 pump station, water travels as both seepage and ground water flow between the water conservation area and the C-11 basin.

Id. at 110. The Supreme Court found the hydrologic connections between the waters to be relevant.

It appears, however, that in documenting the hydrologic connections between the waters, the Court was primarily concerned with whether shutting the stations would ultimately result in the waters becoming one. As such, the hydrologic connections were evidence supporting the SFWMD's position that the waters were only distinct *as a result of* the actions of the pump station and other artificial changes to the natural environment. *See id.* at 113 (Scalia, J. concurring) (questioning "the Court's holding . . . that summary judgment was

precluded by the possibility that, if the pump station were shut down, flooding in the C-11 basin might ultimately cause pollutants to flow from C-11 to WCA-3"). Alternatively stated, the Court did not suggest that the fact that waters are hydrologically connected, without more, compels the conclusion that the waters are not meaningfully distinct.

The Court did not define the precise test by which courts should determine whether two waters are meaningfully distinct. *See id.* at 111. The district court, in the *S-9 Case*, had found that "[t]he canal and the Everglades are two separate bodies of water because the transfer of water or its contents from C-11 into the Everglades would not occur naturally." *S-9 Case*, 1999 WL 33494862 at *6. In *Catskill*, the Second Circuit recognized that a water transfer did not require a NPDES permit unless the transfer moved water from one body of water into a separate body of water. However, the Second Circuit did not outline the precise contours of the test for "distinctness," as it found that the bodies of water in question were "utterly unrelated in any relevant sense." *Catskill I*, 273 F.3d at 492.

Here, the undersigned will not attempt to articulate a precise test for the determination of whether two bodies of water are "meaningfully distinct." But, at a minimum, the evidence must demonstrate that pollutants would not have reached the Lake were it not for backpumping, and that the Lake and canals are distinct from one another and would remain distinct if

backpumping ceased. Suffice it to say that, based upon the evidence presented, the Lake is "meaningfully distinct" from the canals.

The following factors support this conclusion:[59] (1) the waters are separated by a physical barrier (the Dike); (2) historically, water generally flowed south from the Lake (in the system's natural state); (3) today, water also generally continues to flow south; (4) there are chemical differences between the Lake and the canals; (5) there are biological differences between the Lake and the canals; (6) the canals are man-made and were cut into bedrock, while the Lake is a natural bowl-shaped water body; (7) when water enters the Lake *via* backpumping, a visible plume may be observed; (8) backpumping canal water into the Lake has a negative impact upon the Lake; (9) the waters are classified differently under the CWA (the Lake is a Class I water body and the canals are Class III water bodies); and (10) the waters that are backpumped into the Lake would not otherwise reach the Lake (in any significant amount, much less in the same quantities) but for the backpumping activities. These factors demonstrate that, in the absence of an extraordinary event, backpumping is the primary means by which pollutants from one body of water (the canals) enter another, distinct body of water (the Lake).

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59. The Court does not determine the appropriate weight to be given to each factor, nor whether any one factor or combination of factors is dispositive, but rather considers the totality of the factors.

That the canals and Lake are hydrologically connected, while relevant, does not compel a different conclusion. Prior to artificial changes to the Everglades system, water generally sheet flowed from the Lake through the Everglades. Moreover, today a large portion of the canal waters originate in the Lake. Finally, the undersigned is mindful that, both historically and today, waters to the south of the Lake could reach the Lake through seepage, wind-blown activities and, on rare occasions, by gravity flow. Thus, if the relevant question were whether the waters are "completely distinct," the Court would necessarily have to answer the question in the negative. However, the Supreme Court has instructed that the proper question is whether the bodies of water are "*meaningfully* distinct," not "completely distinct."

All bodies of water are, to some extent, hydrologically connected. If a hydrologic connection was sufficient to preclude a finding that two bodies of water are meaningfully distinct, then no two bodies of water in the United States, or the world, would be meaningfully distinct and the test would be completely meaningless.[60] The foregoing "connections" between the canal and Lake waters are not so meaningful as to result in a finding that these bodies of water are not meaningfully distinct.

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60. Obviously, certain water bodies share more hydrologic connections than do others. However, although such connections may certainly be relevant, the "meaningfully distinct" analysis should not turn only upon the degree of hydrologic connections between two water bodies.

Appendix D

Although *Dubois* was decided before the *S-9 Case*, a similar hydrologic connection argument was advanced there. In soundly rejecting the argument, the First Circuit noted that "there is nothing in the statute evincing a Congressional intent to distinguish between 'unrelated' water bodies and related or 'hydrologically connected' water bodies." *Dubois*, 102 F.3d at 1298. Moreover, the First Circuit held:

> It is true that Loon Pond and the East Branch of the Pemigewasset River are "hydrologically connected" in the sense that water from the Pond flows down and eventually empties into the River. But water from the East Branch certainly does not flow uphill into Loon Pond, carrying with it the pollutants that have undisputedly accumulated in the East Branch water from some of the other sources of water entering the East Branch from upstream. Under such circumstances, defendants cannot credibly argue that these water bodies are so related that the transfer of water from the East Branch to Loon Pond is not an "addition" of water from one of the "waters of the United States" to another. We therefore reject the Forest Service's "hydrological connectedness" proposal.

Id. at 1298.

This case presents facts similar to those in *Dubois*, and a similar result is warranted. Admittedly, and as

noted, some of the canal waters may reach the Lake in the absence of backpumping. However, the vast majority of water that reaches the Lake through backpumping would otherwise remain in the canals or flow (or be pumped) south.

The historically unknown and undefined boundary between the Lake and the marshlands to the south of the Lake does not compel a different result. Certainly, the Supreme Court held that a court must determine whether the two waters are, in fact, one water body that has been artificially divided. Plaintiffs presented sufficient evidence to demonstrate that, historically, the Lake and the waters to the south of the Lake were distinct. That the boundary has been artificially altered and that waters that had previously sheet-flowed across the land are now collected in man-made canals is of no consequence.

Thus, and in light of all of the factors mentioned above and the evidence presented, the canals and Lake are meaningfully distinct.[61]

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61. In this opinion, the undersigned, following the lead of the parties, has reviewed the developmental history of the area, as well as the present situation, in a fair amount of detail. By doing so, the undersigned does not mean to suggest that all of the factors upon which the Court heard testimony are relevant to the "meaningfully distinct" inquiry. Indeed, a good argument may be made that relevant CWA policies (those cited by Plaintiffs and Defendants) are frustrated by a finding that an overly exacting and time-consuming inquiry for each water transfer throughout the country is necessary before determining whether a NPDES permit is required.

C. The SFWMD Is Entitled to Sovereign Immunity.

The Order of November 23, 2005 addressed the parties' cross-motions for summary judgment on the issue of the SFWMD's sovereign immunity. [D.E. 527]. The November 23, 2005 Order denied the motions[62] because material factual issues were in dispute and, at the time, the parties had not had an adequate opportunity to complete discovery. (*November 23, 2005 Order*, p. 11). Now, with the benefit of a fully-developed record, the Court again considers the SFWMD's entitlement to sovereign immunity.

The Eleventh Amendment to the United States Constitution provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. It is well-settled that the Eleventh Amendment also bars suits against a state initiated by the state's own citizens. *See, e.g., Hans v. Louisiana*, 134 U.S. 1 (1890); *Employees v. Dep't. of Pub. Health and Welfare*, 411 U.S. 279 (1973); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Moreover, the Eleventh Amendment bars "certain actions against state agents

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62. The order found that the official capacity claims against Henry Dean, Director of the SFWMD, could proceed under the doctrine of *Ex Parte Young*, 209 U.S. 123 (1908). (*See* [D.E. 527] at 12-16).

and state instrumentalities." *Shands Teaching Hosp. and Clinics, Inc. v. Beech Street Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000) (citing *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)). The Eleventh Amendment does not bar suits against counties, municipal corporations or other political subdivisions of the state. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

The Eleventh Circuit has embraced a four-part inquiry to determine whether an entity is an instrumentality of the state, entitled to sovereign immunity, or a political subdivision, not entitled to sovereign immunity. *Abusaid v. Hillsborough County Bd. of County Comm'rs*, 405 F.3d 1298, 1303 (11th Cir. 2005). The analysis takes into account: (1) how state law defines the entity; (2) the degree of control the state maintains over the entity; (3) the source of the entity's funds; and (4) who bears financial responsibility for judgments entered against the entity. *Id.* (citing *Manders v. Lee*, 338 F.3d 1304, 1309 (11th Cir. 2003) (*en banc*)). Thus, while an entity's entitlement to sovereign immunity is governed by federal law, the inquiry largely turns on matters of state law. *See id.*

Although the SFWMD's entitlement to sovereign immunity has been considered by courts within the Southern District of Florida on several occasions, no consensus has been reached. Some courts have found the SFWMD to be an instrumentality of the state, immune from suit. *See Grimshaw v. So. Florida Water*

Mgmt. Dist., 195 F. Supp. 2d 1358 (S.D. Fla. 2002); *Nicholas G. Aumen, Ph.D. v. So. Florida Water Mgmt. Dist.*, Case No. 99-8928-Civ (S.D. Fla. Mar. 28, 2000); *Miccosukee Tribe of Indians of Florida v. United States*, 980 F. Supp. 448 (S.D. Fla. 1997); *Bensch v. Metro. Dade County*, 952 F. Supp. 790, 797 (S.D. Fla. 1996); *Indian Trails Water Control Dist. v. So. Florida Water Mgmt. Dist.*, No. 96 Civ. 8528 (S.D. Fla. Dec. 12, 1996). Others have reached the opposite conclusion. *See Miccosukee Tribe of Indians of Florida v. So. Florida Water Mgmt. Dist.*, Case No. 98-6056-Civ, 1999 WL 33494862 (S.D. Fla. Sept. 30, 1999); *IT Corp. v. So. Florida Water Mgmt. Dist.*, Case No. 97-8872-Civ (S.D. Fla. July 20, 1998). Indeed, in an unpublished opinion, the Eleventh Circuit observed that the question of whether the SFWMD is an arm of the state or a political subdivision is a close one. *Miccosukee Tribe of Indians v. United States*, 163 F.3d 1359 (11th Cir. 1998) (unpublished), *cert. denied*, 528 U.S. 810 (1999).

An analysis of the relevant four factors, factors that do not all point to the same conclusion, underscores the difficulty that past courts have had in answering this question.

1. *Definition Under Florida Law*

The Eleventh Circuit has emphasized that the "state law definition" prong of the analysis "must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which

liability is asserted to arise." *Abusaid*, 405 F.3d at 1303. The undersigned is mindful that "states have extremely wide latitude in determining their forms of government and how state functions are performed." *Manders*, 338 F.3d at 1309 n.10.

The Florida Legislature has recognized that the management and protection of water resources is of critical importance to the *State*. As such, the Legislature has declared that "[t]he waters *in the state* are among its basic resources. Such waters have not heretofore been conserved or fully controlled so as to realize their full beneficial use." Fla. Stat. § 373.016 (emphasis added). The Florida Legislature has further found as follows:

> Because water constitutes a public resource [benefitting] *the entire state, it is the policy of the Legislature that the waters in the state be managed on a state and regional basis.* Consistent with this directive, the Legislature recognizes the need to allocate water throughout the state so as to meet all reasonable-beneficial uses. However, the Legislature acknowledges that such allocations have in the past adversely affected the water resources of certain areas in this state.

* * *

Appendix D

> The Legislature recognizes that the water resource problems of the state vary from region to region, both in magnitude and complexity. It is therefore the intent of the Legislature to vest in the Department of Environmental Protection or its successor agency the power and responsibility to accomplish the conservation, protection, management, and control of the waters of the state and with sufficient flexibility and discretion to accomplish these ends through delegation of appropriate powers to the various water management districts. The department may exercise any power herein authorized to be exercised by a water management district; however, to the greatest extent practicable, such power should be delegated to the governing board of a water management district.
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> * * *
>
> It is further declared the policy of the Legislature that each water management district, to the extent consistent with effective management practices, shall approximate its fiscal and budget policies and procedures to those of the state.

Fla. Stat. § 373.016 (4)-(6) (emphasis added). Moreover the Legislature found that "the general regulatory and administrative functions of the [water management]

districts herein authorized are of *general benefit to the people of the state.*" Fla. Stat. § 373.503(1) (emphasis added).

The water management districts were created by state law and each district's boundaries are defined by state law. *See* Fla. Stat. § 373.069. State law establishes the governance structure of each district. *See, e.g.*, Fla. Stat. §§ 373.073, 373.076, 373.083, 373.103. Furthermore, the DEP, a state agency, delegates responsibilities to the SFWMD and the other water management districts. (*Trial Tr. Jan. 19, 2006*, 115:22-116:1). The SFWMD has been designated, *by state law*, as the local sponsor for many CERP components. Fla. Stat. § 373.1501. Moreover, the water management districts are listed as "major component units" of the State of Florida in the State comprehensive annual financial report. (*See Trial Tr. Jan. 19, 2006*, 110:15-20; *Def. Ex. 104*).

Notwithstanding that the water management districts manage a State resource, were established by the State, and are governed by laws established by the State, the water management districts have been treated somewhat inconsistently by the state courts and other state laws. For instance, the Florida constitution provides that "[n]o state ad valorem taxes shall be levied upon real estate or tangible personal property." Fla. Const. art. 7 s. 1(a). Special districts, however, are authorized to levy ad valorem taxes. Fla. Const. art. 7 s. 9(a). Because water management districts are special taxing districts, they, unlike the State, may levy ad

valorem taxes. *See* Fla. Stat. § 373.503(2)(a); Fla. Stat. 373.0697; *Barley v. So. Florida Water Mgmt. Dist.*, 823 So. 2d 73, 74 (Fla. 2002).

Likewise, in *Canaveral Port Auth. v. Dep't. of Revenue*, 690 So. 2d 1226 (Fla. 1996) the Florida supreme court was faced with the question of whether Brevard County could impose ad valorem taxes upon the Canaveral Port Authority. In rejecting the port authority's claim of immunity, the court held that

> only the State and those entities which are expressly recognized in the Florida Constitution as performing a function of the state comprise "the state" for purposes of immunity from ad valorem taxation. What comprises "the state" is thus limited to counties, entities providing the public system of education, and agencies, departments, or branches of state government that perform the administration of the state government.

Id. at 1228.

While *Canaveral* did not directly speak to the appropriate classification of "special districts," the dissent interpreted the opinion as holding that special districts such as the SFWMD would not be treated as the "state" for purposes of determining whether they are immune from ad valorem taxation. *Id.* at 1231. As noted by *Grimshaw*, however, the *Canaveral* court's definition of state "includes political subdivisions such

as counties, cities, and school boards which are not entitled to Eleventh Amendment immunity." *Grimshaw*, 195 F. Supp. 2d at 1365.

Conversely, in other contexts, state courts have treated water management districts as arms of the State. *See Dade County v. Nat'l Bulk Carriers, Inc.*, 450 So. 2d 213, 216 (Fla. 1984) (the "legislature intended to apply the provisions of chapter 373 to *agencies* dealing with water resources"); *So. Florida Water Mgmt. Dist. v. Taylor*, 676 So.2d 11 (Fla. 3d DCA 1996) (SFWMD entitled to traditional sovereign immunity under state law). Thus, and notwithstanding Plaintiffs' arguments to the contrary, in analyzing the manner in which state law treats water management districts, it is necessary to look beyond mere labels placed upon the SFWMD in other contexts in order to ascertain the essence of the SFWMD under state law.

"[T]he Legislature defines the water management districts as operating under state control to perform a state function with a regional component." *Grimshaw*, 195 F. Supp. 2d at 1364. Indeed, the State has specifically delegated certain responsibilities to the SFWMD so that it may effectively manage the waters within its boundaries, which are set by the State. The Eleventh Circuit has held that the sovereign immunity question "must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Abusaid*, 405 F.3d at 1303. Here, Plaintiffs seek to impose liability upon the SFWMD for the manner in

which it carries out the responsibilities delegated to it by the State and implements state policy. Therefore the first factor weighs heavily in favor of a finding that the SFWMD is immune from suit.

2. *Florida's Degree of Control over the SFWMD*

Florida exerts extensive control over the SFWMD. Statutory controls over the SFWMD include: (1) the nine member governing board of the SFWMD is appointed by the governor of Florida, subject to confirmation by the Florida Senate, Fla. Stat. § 373.073(1)(a); (2) the governor must approve of, and the Florida Senate must confirm, the executive director of the SFWMD (he or she is appointed by the governing board), Fla. Stat. § 373.079(4)(a); (3) the governor has the authority to remove any officer of the SFWMD from office, Fla. Stat. § 373.076(2); and (4) the State auditor general may, at the direction of the governor, audit each water management district's accounts. Fla. Stat. § 373.589.

Moreover, the SFWMD budgeting process, which spans nine months, involves the DEP, the governor, and the legislature. (*Trial Tr. Jan. 19, 2006*, 123:13-124:5). The SFWMD must submit its proposed budget to the DEP, the legislature, and the governor, and the governor has line-item veto authority over the budget. (*Id.*, 107:5-6). The governor's office also reviews the SFWMD's revenue sources. (*See id.*, 132:17-19). Furthermore, the DEP or the legislature may provide written objections

or comments to the proposed budget, and the SFWMD must respond to them. (*Id.*, 107:6-9, 116:2-7).

"[W]here the budget of an entity is submitted to the state for approval, it is presumed for the purposes of evaluating the degree of state control and the entity's fiscal autonomy, that the entity is an agency of the state." *Grimshaw*, 195 F. Supp. 2d at 1366 (citing *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir. 1990); *Harden v. Adams*, 760 F.2d 1158, 1163 (11th Cir.), *cert. denied*, 474 U.S. 1007 (1985); *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518, 1520 (11th Cir. 1983)). The State has multiple mechanisms by which it exerts control over the SFWMD. Thus, the second factor, too, strongly favors granting sovereign immunity to the SFWMD.

3. *Source of the SFWMD's Funds and Financial Responsibility for Judgments Entered Against the SFWMD*

Courts have often analyzed the third and fourth prongs of the sovereign immunity inquiry in tandem, as the primary concern of the third prong is whether the state will be required to fund any judgment against the entity in question. *See Shands Teaching Hosp.*, 208 F.3d at 1311; *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir. 1990). The undersigned does so here as well.

The SFWMD budget for 2006 was $ 1.1 billion. (*Trial Tr. Jan. 19, 2006*, 129:24-25). General appropriations

from the State accounted for 25 to 30 percent of the budget. (*Id.*, 107:4-5). In addition to general appropriations, the State provides the SFWMD with special appropriations for specific projects. Moreover, the SFWMD receives revenue streams from bond proceeds, gas tax revenues, license plate revenues, and trust fund revenues, among others. (*Id.*, 131:6-12). The funds generated from these revenue streams are deposited in trust funds that the SFWMD may access. (*Id.*, 131:13-18).

The SFWMD also generates a significant portion of its revenues through its own fund-raising activities. (*See Trial Tr. Jan. 19, 2006*, 130:16-21). These sources include funds generated through ad valorem taxation, federal grants, millage rates, and agricultural privilege taxation. (*See id.*). Ad valorem tax rates are set by the governing board of the SFWMD (*Id.*, 142:11-15), although the State imposes a limit upon the SFWMD's ability to impose ad valorem taxes. (*Id.*, 135:5-10). The SFWMD may also issue general obligation bonds and revenue bonds, although it has not issued general obligation bonds in the past. (*Id.*, 135:21-136:10).

Regarding the payment of judgments, the SFWMD carries insurance for losses to its buildings, facilities and aircraft. (*Trial Tr. Jan. 19, 2006*, 136:11-18). The SFWMD also maintains a self-insurance fund which is reserved to pay future claims in the areas of automobile liability, workers' compensation, and general liability. (*Id.*, 136:17:137:3).

Where large judgments have been rendered against the SFWMD in the past, the SFWMD has satisfied the judgments using state trust funds to which it has access (*Trial Tr. Jan. 19, 2006*, 131:19-132:1) and/or out of land act acquisition funds provided for in the SFWMD budget. (*Id.*, 139:3-140:6). If a judgment were sufficiently substantial, the SFWMD would be forced to declare a financial emergency and would have to request additional funds from the State. (*Id.*, 141:9-19). The State of Florida has no legal obligation to satisfy any judgments against the SFWMD.

The State's lack of a legal obligation to satisfy judgments against the SFWMD weighs against finding that the SFWMD is entitled to sovereign immunity. Nevertheless, the State's contribution of a substantial portion of the SFWMD budget, and the fact that it might, as a practical matter, be forced to satisfy any judgments against the SFWMD, counsel against weighing the third and fourth factors too strongly, if at all, against the SFWMD's sovereign immunity.

5. *Conclusion*

The first and second factors of the analysis weigh heavily in favor of the SFWMD's immunity from suit. In *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), the Supreme Court noted that the impetus for adoption of the Eleventh Amendment was "the prevention of federal-court judgments that must be paid out of a State's treasury." *Id.* at 48 (citation omitted). It approvingly cited circuit court cases finding

"the vulnerability of the State's purse as the most salient factor in Eleventh Amendment determinations." *Id.* Notwithstanding some language in the *Hess* opinion to the contrary, the Eleventh Circuit has clarified that although *Hess* weighed the "source-of-payment factor heavily, *Hess* never suggests that for Eleventh Amendment immunity a state treasury drain is required *per se* and *Hess* notes that 'current Eleventh Amendment jurisprudence emphasizes the integrity retained by each State in our federal system.'" *Manders*, 338 F.3d at 1325. Indeed, in *Manders*, the Eleventh Circuit found that a Georgia sheriff was entitled to sovereign immunity notwithstanding the undisputed fact that the state *would not pay any judgment against him.*

The question of the SFWMD's entitlement to sovereign immunity is a difficult one. Nevertheless, the Court finds that the critical role that the SFWMD plays for the State, the level of control that the State exercises over the SFWMD, the State's substantial contributions to the SFWMD, and the likelihood that the State would likely be forced to satisfy any substantial judgments against the SFWMD, tip the scales in favor of a finding that the SFWMD is immune from suit.

6. *Did the SFWMD Waive its Sovereign Immunity?*

Plaintiffs argue that even if the SFWMD would otherwise be entitled to sovereign immunity, it waived its sovereign immunity by filing a Counterclaim against

Plaintiffs.[63] After commencement of this suit, the SFWMD filed an Answer on August 5, 2002 [D.E. 11]. In its Answer, the SFWMD asserted, as affirmative defenses, that (1) the suit was barred by the Eleventh Amendment; and (2) the claims were barred by the doctrine of sovereign immunity. (*Answer*, p. 5).[64] The SFWMD also asserted a Counterclaim in which it sought (1) a declaration that it did not need a permit for its flow diversion activities at S-2 and S-3; (2) a declaration that the SFWMD is not responsible under the CWA for all pre-existing pollutants introduced to the waters managed by S-2 and S-3 from other sources; (3) a declaration that it is not responsible under the CWA for those pollutants that have already been permitted or are exempt from permitting under the CWA; (4) an award of attorney's fees and costs; and (5) any further relief the Court deems just and proper. On May 22, 2003, the SFWMD filed a substantially identical Answer (including the Counterclaim) to FWF's and Miccosukee's Complaints. (*See* [D.E. 85, 107]).

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63. On January 6, 2006, the Court issued an Order Granting South Florida Water Management District's Motion for Voluntary Dismissal [D.E. 249], dismissing the then-pending Counterclaim. The Order stated, however, that "[t]o the extent that, as Plaintiffs argue, bringing a counterclaim affects an entity's sovereign immunity status, the record is clear that the SFWMD has already asserted counterclaims and the Court ascertains no means by which their dismissal would alter the Court's legal analysis, or Plaintiffs' rights." Thus, the dismissal does not impact the Court's analysis.

64. The SFWMD did not file a motion to dismiss on either ground.

Appendix D

After Plaintiffs amended their pleadings following the Supreme Court's decision in the *S-9 Case* and the re-opening of this litigation, the SFWMD again answered the Complaints by asserting the defenses of Eleventh Amendment and sovereign immunity. (*See* [D.E. 204, 206, 269]).[65] The SFWMD filed a Motion for Summary Judgment on Eleventh Amendment immunity on August 5, 2005 [D.E. 374] and, on the same day, FWF filed a Motion for Summary Judgment on Defendant SFWMD's Affirmative Defenses of Constitutional Bars and Immunities [D.E. 382]. As already stated, the cross-motions were denied as to the SFWMD. Plaintiffs argue that through its litigation tactics, particularly its filing of a Counterclaim, the SFWMD waived its Eleventh Amendment immunity.

Although the Eleventh Amendment generally bars suits against states and their agencies in federal court, there are several exceptions to the rule. Plaintiffs argue that the long-established "waiver" exception applies here. As far back as 1883, the Supreme Court held that "immunity from suit belonging to a state . . . is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction." *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883); *see also*

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65. The language of SFWMD's Counterclaim differs slightly among its various Answers. The substance of the relief sought, however, remained the same.

Cate v. Oldham, 707 F.2d 1176, 1182 n. 4 (11th Cir. 1983) ("[T]he state by its own action may waive Eleventh Amendment immunity."). A state's waiver of sovereign immunity, however, must be "unequivocally expressed." *Doe v. Moore*, 410 F.3d 1337, 1349 (11th Cir. 2005) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)).

Although a state may waive its Eleventh Amendment immunity through several means, the relevant question is whether the SFWMD waived its immunity through its affirmative litigation conduct. *In re Burke*, 146 F.3d 1313, 1318 (11th Cir. 1998). It is appropriate to "find a waiver either if the State voluntarily invokes [a federal court's] jurisdiction, or else if the State makes a 'clear declaration' that it intends to submit itself to [a federal court's] jurisdiction." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-76 (1999) (internal citations omitted).

Here, the SFWMD found itself in federal court after a suit was filed against it. The SFWMD clearly did not invoke the Court's jurisdiction, at least at the outset of the case. Moreover, in all of its Answers, and in its Motion for Summary Judgment, the SFWMD steadfastly maintained that it was entitled to Eleventh Amendment immunity. Accordingly, the SFWMD has not unequivocally expressed an intent to waive its immunity. Nevertheless, Plaintiffs contend that by filing the Counterclaim, and by otherwise defending the case on

the merits, the SFWMD has implicitly waived its immunity. The undersigned disagrees.

Courts have been inconsistent in determining the effect that a state's filing of a counterclaim has upon its immunity. *Paul N. Howard Co. v. Puerto Rico Aqueduct Sewer Auth.*, 744 F.2d 880 (1st Cir. 1984), is the case most often relied upon for the proposition that a state waives its sovereign immunity when it files a counterclaim. In *Paul N. Howard Co.*, the First Circuit held that "where PRASA not only appeared but filed a counterclaim and a third-party complaint, we have little trouble concluding that PRASA voluntarily submitted to the jurisdiction of the federal court, thereby waiving any Eleventh Amendment immunity it might or might not have enjoyed." *Id.* at 886 (citing *Newfield House, Inc. v. Massachusetts Dep't. of Pub. Welfare*, 651 F.2d 32, 36 n. 3 (1st Cir. 1981)); *see also Mohegan Tribe v. State of Connecticut*, 528 F. Supp. 1359 (D.C. Conn. 1982) (finding that state waived its sovereign immunity by filing counterclaim); *Aldens v. Ryan*, 454 F. Supp. 465, 470 (W.D. Okla. 1976) (finding that state waived immunity by answering complaint without objection, asserting counterclaim, and entering stipulation of fact).

Other courts have reached the opposite conclusion. In *State Contracting and Engineering Corp. v. Florida Dept. of Trans.*, No. 97-7014-Civ, 2000 WL 34220818 (S.D.Fla. 2000), the court found that a state did not waive its immunity by filing a counterclaim. It distinguished the case from *Howard*, and emphasized

that the counterclaim did not assert new issues into the case, it only sought a declaratory judgment, and that, at the time the state filed its counterclaim, the state of the law was such that it appeared that the state could not have successfully asserted an immunity defense. *See* at *4. In affirming the court's ruling on the issue of waiver, the Federal Circuit held "that the filing of a counterclaim during a period when the State was reasonably unsure about the availability of an immunity defense was not a waiver." *State Contracting & Eng'g. Corp. v. State of Florida*, 258 F.3d 1329, 1337 (2001), *cert. denied*, 534 U.S. 1131 (2002).

Other courts have reached similar conclusions. *See Kelley v. Edison Twp.*, No. 03-4817-Civ, 2006 WL 1084217 (April 25, 2006) (state did not waive immunity by filing of third-party complaint, as the action should be viewed as a defensive posture); *Santee Sioux Tribe of Nebraska v. State of Nebraska*, 121 F.3d 427 (8th Cir. 1997) (answering complaint and filing counterclaim did not waive state's immunity because assistant attorney general was not authorized to waive immunity); *Mescalero Apache Tribe v. State of New Mexico*, 131 F.3d 1379, 1385 n. 4 (10th Cir. 1997) (affirming district court ruling that state did not waive sovereign immunity by filing counterclaim); *Nat'l. R.R. Passenger Corp. v. Rountree Transp. and Rigging, Inc.*, 896 F. Supp. 1204, 1206-07 (M.D. Fla. 1995) (in order to find a waiver through the state's filing of a counterclaim "state defendants still must announce their waiver of Eleventh Amendment immunity unequivocally").

In evaluating whether a state has waived its immunity, "[c]ourts indulge every reasonable presumption against waiver." *College Sav. Bank*, 527 U.S. at 682 (quoting *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)). Likewise, "[a] finding of waiver is appropriate only where the state's consent is 'stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'"[66] *M.A. ex rel. E.S. v. State-Operated Sch. Dist. of City of Newark*, 344 F.3d 335, 345 (3d Cir. 2003) (quoting *Edelman v. Jordan*, 415 U.S. 651, 673 (1974)). In other words, the test for finding voluntary waiver is a stringent one. *See id.*

In light of the stringent standard governing the "waiver" inquiry, the Court does not find that the SFWMD waived its immunity in this case. From the outset of this litigation, the SFWMD has asserted the affirmative defenses of sovereign immunity and Eleventh Amendment immunity. Moreover, it filed a motion for summary judgment on the issue. That the SFWMD also defended the case on the merits is not dispositive as the Eleventh Circuit has held that "Eleventh Amendment jurisdictional questions can be raised for the first time on appeal." *Doe*, 410 F.3d at 1349.

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66. Although *Newark* concerned the question of whether the state had waived its immunity by accepting federal funds (as opposed to waiver through litigation conduct), the court's emphasis on the question of whether the state clearly intended to waive its immunity is relevant.

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The SFWMD's filing of a Counterclaim is not dispositive. It is certainly true that when a state files a suit in federal court, it is generally considered to have waived its Eleventh Amendment immunity. *See, e.g.*, *Burke*, 146 F.3d at 1319-20; *Gardner v. New Jersey*, 329 U.S. 565 (1947). However, cases holding that the filing of a claim in federal court (or removal of a claim to federal court) waived immunity are primarily concerned with fairness. To state it differently, where a state invokes the power and jurisdiction of a federal court, it may not then use the Eleventh Amendment as a shield when a non-state party seeks to defend itself. As the Supreme Court explained in *Gardner*,

> [i]t is traditional bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demanding its allowance must abide the consequences of that procedure. . . . If the claimant is a State, the procedure of proof and allowance is not transmitted into a suit against the State because the court entertains objections to the claim. The State is seeking something from the debtor. No judgment is sought against the State. The whole process of proof, allowance, and distribution is, shortly speaking, an adjudication of interests claimed in a res. It is none the less such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or satisfied in some way other than payment in cash.

> When the State becomes the actor and files a claim against the fund it waives any immunity which it otherwise might have had respecting the adjudication of the claim.

Gardner, 329 U.S. at 573-74 (internal citations omitted).

More than 50 years later, the Court emphasized the fairness considerations implicit in its waiver jurisprudence in holding that where a party removes a case to federal court, it may not subsequently claim Eleventh Amendment immunity. *See Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613 (2002).

> It would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the "Judicial power of the United States" extends to the case at hand, and (2) to claim Eleventh Amendment immunity, thereby denying that the "Judicial power of the United States" extends to the case at hand. And a Constitution that permitted States to follow their litigation interests by freely asserting both claims in the same case could generate seriously unfair results. Thus, it is not surprising that more than a century ago this Court indicated that a State's voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity.

Id. at 619. No such equitable considerations are present here.

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The SFWMD was involuntarily brought into federal court by Plaintiffs. In filing a Counterclaim seeking a declaratory judgment, the SFWMD essentially asked the Court to find that Plaintiffs were not entitled to the relief they seek. The SFWMD did not seek to have the Court compel any action on the part of Plaintiffs.[67] Moreover, it is relevant that, as mentioned, the SFWMD's entitlement to sovereign immunity was in doubt at the time this suit was filed (and remains unclear today). Thus, the case is similar to the situation in *State Contracting & Eng'g. Corp.* in that the SFWMD could have been "reasonably unsure about the availability of an immunity defense."[68] *See State Contracting & Eng'g. Corp.*, 258 F.3d at 1337.

Given that (1) the SFWMD has asserted its immunity from the outset, (2) the SFWMD filed a motion for summary judgment on the issue of its immunity from suit; (3) the state of the law on the SFWMD's

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67. The Court leaves undecided, and takes under advisement, whether the SFWMD has waived its immunity to the extent that Plaintiffs are entitled to attorney's fees arising from their defense of the SFWMD's Counterclaim. *See In re Burke*, 146 F.3d at 1319-20 (holding that the state's waiver of sovereign immunity was narrow).

68. Plaintiffs argue that the SFWMD could not have been reasonably unsure about the defense in light of the decision in *Grimshaw*. *See* 195 F. Supp. 2d 1358. The undersigned disagrees, as *Grimshaw* conflicted with the holdings of other courts within this District. A different question would have been presented had the Eleventh Circuit previously held that the SFWMD was entitled to sovereign immunity.

entitlement to immunity is uncertain; and (4) the SFWMD's assertion of immunity has not resulted in any unfairness to Plaintiffs, the Court finds that the SFWMD has not waived its immunity.

IV. CONCLUSION

The problems facing Lake Okeechobee and the Everglades are far from simple. No one suggests that requiring the SFWMD and/or its Director to obtain a NPDES permit prior to backpumping will solve these problems or even substantially contribute to a solution. However, in enacting the CWA, Congress imposed certain requirements upon all entities that discharge pollutants into navigable waters. As in any statutory analysis, it is not the function of the Court to second-guess Congress' wishes, but rather, to seek to discern them where the meaning of a statute is at issue.

Plaintiffs have requested that the Court require the SFWMD and/or its Director to obtain a NPDES permit. It was after the close of trial that the EPA issued its Proposed Rule, proposing an amendment to the NPDES regulations that would specifically exempt all water transfers from the NPDES permitting scheme. Moreover, there is no dispute that, at present, the SFWMD may not cease its backpumping operations because massive flooding would result. At the close of the trial, it remained unclear exactly what the nature of any prospective relief, if granted to Plaintiffs, and the scope of any obligations imposed upon Defendants, should be.

The parties did address these matters generally in their post-trial submissions. In apparent recognition that the issue of the extent of any remedies to be awarded Plaintiffs had not been adequately addressed at trial, or in the pre- or post-trial briefs, the FWF and Miccosukee suggest that the Court order SFWMD to promptly apply for a NPDES permit, and "then proceed to a remedy phase at which the Court may determine the appropriate penalty, *see* 33 U.S.C. § 1319(d), and any injunctive relief the Court deems appropriate." (*Prop. Findings of Fact and Conclusions of Law* [D.E. 592] at 114-115). U.S. Sugar devotes considerable discussion in its post-trial submission to the question of remedy and injunctive relief, and argues that Plaintiffs have not carried their burden of demonstrating irreparable injury, the inadequacy of legal remedies, and that the need for protection from flooding does not outweigh Plaintiffs' need for injunctive relief. (*See Corrected Copy of Proposed Findings* [D.E. 596]).

In accordance with the foregoing and Federal Rule of Civil Procedure 58, the Court will, by separate document, enter judgment for Plaintiffs, declaring that, in the absence of a NPDES permit, the operation of the S-2, S-3, and S-4 pump stations to backpump pollutant-containing waters from the canals in a northerly direction into Lake Okeechobee is in violation of the CWA. Entry of a final judgment is deferred, however, pending further proceedings to consider Plaintiffs' requests for injunctive relief. The Court will retain jurisdiction over the parties to ensure compliance with the judgment and any subsequent remedial measures.

For all of the foregoing reasons, it is

ORDERED AND ADJUDGED as follows:

1. The parties are to submit a proposed joint scheduling report, suggesting the nature and timing of additional proceedings and written briefing concerning the entry of a permanent injunction.[69] The report shall be filed by no later than December 22, 2006. If the parties are in disagreement as to any proposal, they are to so indicate in the joint report.

2. Any of the foregoing conclusions of law which may represent findings of fact are adopted as findings of fact.

DONE AND ORDERED in Chambers at Miami, Florida this 11th day of December, 2006.

s/ Cecilia M. Altonaga
CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

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69. In light of the Court's finding that the SFWMD is entitled to sovereign immunity, any injunction would be directed to the SFWMD's executive director.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED AND FILED MAY 7, 2010, DENYING THE PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 07-13829

D.C. Docket No. 02-80309 CV-CMA

FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION,

Plaintiffs-
Counter-Defendants-
Appellees
Cross-Appellants,

FISHERMEN AGAINST DESTRUCTION OF THE ENVIRONMENT,

Plaintiff-
Counter-Defendant
Appellee,

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Intervenor-Plaintiff-
Counter-Defendant-
Appellee
Cross-Appellant,

Appendix E

versus

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Defendant-
Counter-Claimant-
Cross-Appellee,

CAROL WEHLE, Executive Director,

Defendant-Appellant,

UNITED STATES OF AMERICA,
U.S. SUGAR CORPORATION,

Intervenor-Defendants-
Appellants.

Appeal from the United States District Court
for the Southern District of Florida

Before DUBINA, Chief Judge, TJOFLAT, EDMONDSON, BIRCH, BLACK, CARNES, BARKETT, HULL, MARCUS, WILSON, PRYOR, and MARTIN, Circuit Judges.

BY THE COURT:

The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure), the Suggestion of Rehearing En Banc is **DENIED**.

APPENDIX F — RELEVANT STATUTES

Pertinent Clean Water Act Provisions

Section 301, 33 U.S.C. § 1311. Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

> Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

* * * *

Section 303, 33 U.S.C. § 1313. Water quality standards and implementation plans

* * * *

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

> (1) (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311 (b)(1)(A) and section 1311 (b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority

ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314 (a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety * * *.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314 (a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection.

* * * *

Appendix F

Section 402, 33 U.S.C. § 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311 (a) of this title****

* * * *

(*l*) Limitation on permit requirement

(1) Agricultural return flows

The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

(2) Stormwater runoff from oil, gas, and mining operations

The Administrator shall not require a permit under this section, nor shall the Administrator directly or indirectly require any State to

require a permit, for discharges of stormwater runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances or systems of conveyances (including but not limited to pipes, conduits, ditches, and channels) used for collecting and conveying precipitation runoff * * * *

* * * *

Section 404, § 1344. Permits for dredged or fill material

(a) Discharge into navigable waters at specified disposal sites

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

* * * *

Appendix F

Section 502, 33 U.S.C. § 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

* * * *

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean

(A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or

(B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well,* * *.

Appendix F

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means

> (A) any addition of any pollutant to navigable waters from any point source,
>
> (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

* * * *

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

Appendix F

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants

(A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and

(B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

* * * *

APPENDIX G — RELEVANT REGULATION

40 C.F.R. § 122.3

§ 122.3 Exclusions.

The following discharges do not require NPDES permits:

(a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.

(b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

(c) The introduction of sewage, industrial wastes or other pollutants into publicly owned treatment works by indirect dischargers. Plans or agreements to switch to this method of disposal in the future do not relieve dischargers of the obligation to have and comply with permits until all discharges of pollutants to waters of the United States are eliminated. (See also § 122.47(b)). This exclusion does not apply to the introduction of pollutants to privately owned treatment works or to other discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other party not leading to treatment works.

(d) Any discharge in compliance with the instructions of an On-Scene Coordinator pursuant to 40 CFR part 300 (The National Oil and Hazardous Substances Pollution Contingency Plan) or 33 CFR 153.10(e) (Pollution by Oil and Hazardous Substances).

(e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to

aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.

(f) Return flows from irrigated agriculture.

(g) Discharges into a privately owned treatment works, except as the Director may otherwise require under § 122.44(m).

(h) The application of pesticides consistent with all relevant requirements under FIFRA (i.e., those relevant to protecting water quality), in the following two circumstances:

> (1) The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in waters of the United States.
>
> (2) The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for

example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests.

(i) Discharges from a water transfer. Water transfer means an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use. This exclusion does not apply to pollutants introduced by the water transfer activity itself to the water being transferred.

173 (5) (2)

Nos. 10-196 and 10-252

In the Supreme Court of the United States

FRIENDS OF THE EVERGLADES, ET AL., PETITIONERS

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ET AL.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, PETITIONER

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

This case involves the application of 40 C.F.R. 122.3(i), a regulation issued by the Environmental Protection Agency in 2008 pursuant to its authority under the Clean Water Act (CWA). Section 122.3(i) provides that a transfer of water from one body of navigable waters to another without alteration or intervening use of the water is not subject to the CWA's National Pollutant Discharge Elimination System permitting program. The question presented is as follows:

Whether the court of appeals correctly held that Section 122.3(i) reflects a reasonable interpretation of the pertinent statutory language and therefore is entitled to deference under the framework set forth in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

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In the Supreme Court of the United States

No. 10-196

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No. 10-252

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 570 F.3d 1210.[1] The opinions of the district court (Pet. App. 41a-202a) are unreported.

[1] All references to the Pet. App. are to the appendix to the petition for a writ of certiorari filed in No. 10-196.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2009. Petitions for rehearing were denied on May 7, 2010 (Pet. App. 203a-204a). The petition for a writ of certiorari in No. 10-196 was filed on August 5, 2010. On August 3, 2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari in No. 10-252 to and including August 19, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, to respond comprehensively, as a matter of national policy, to the complex problem of restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters. 33 U.S.C. 1251(a). The CWA recognizes the responsibilities of individual States to protect water quality, see 33 U.S.C. 1251(b), and to manage water resources, including "the authority of each State to allocate quantities of water within its jurisdiction," 33 U.S.C. 1251(g). The CWA addresses the problem of water pollution through a multifaceted federal-state approach that includes provisions directed to research and related programs (33 U.S.C. 1251-1274), grants for construction of treatment works (33 U.S.C. 1281-1301), the establishment and enforcement of standards, including effluent and water-quality standards (33 U.S.C. 1311-1330), and the issuance of permits and licenses (33 U.S.C. 1341-1346).

Section 301(a) of the CWA prohibits "the discharge of any pollutant" except in compliance with other specified sections of the Act, including (as pertinent here) Section 402. 33 U.S.C. 1311(a). The Act defines the

term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12)(A). The term "navigable waters," in turn, is defined to mean "the waters of the United States." 33 U.S.C. 1362(7).

CWA Section 402 creates the National Pollutant Discharge Elimination System (NPDES) permitting program. Section 402(a) provides that the Environmental Protection Agency (EPA) or a qualifying State "may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding [Section 301(a) of the Act]," so long as the discharge satisfies specified requirements. 33 U.S.C. 1342(a)(1). NPDES permits typically impose limitations on point source discharges by establishing permissible rates, concentrations, or quantities of specified constituents at the points where the discharge streams enter the waters of the United States. See 33 U.S.C. 1342(a)(1) and (2); see generally 40 C.F.R. Pts. 122, 125; see also, *e.g.*, *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 174, 176 (2000).

The CWA does not impose permit requirements for discharges from nonpoint sources such as runoff. Instead, the Act encourages the States to develop local programs, which may include techniques such as land-use requirements, to control nonpoint sources of pollution. See, *e.g.*, 33 U.S.C. 1288(b)(2)(F), 1314(f), 1329.

2. In 1948, Congress authorized the Central and Southern Florida Flood Control Project (Project). To implement the Project, the United States Army Corps of Engineers is charged with constructing a comprehensive network of levees, water storage areas, pumps, and canal improvements that would serve several purposes,

including flood protection, water conservation, and drainage. Flood Control Act, Pub. L. No. 80-858, 62 Stat. 1171, 1176; see *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 99-100 (2004) (*Miccosukee*). Respondent South Florida Water Management District (SFWMD) is the local sponsor and day-to-day operator of the Project.

Historically, during the rainy season, surface water of Lake Okeechobee would rise and then glide through the Everglades to Florida Bay, at a very slow pace due to the nearly flat topography, in a predominately southern direction through vast expanses of wetlands, sloughs, and shallow streams. Pet. App. 76a-78a, 174a. As a result of the Project, virtually the entire lake has become enclosed by a dike made of dredged materials. *Id.* at 72a-73a & n.17. As relevant here, three pump stations (known as S-2, S-3, and S-4) are embedded in the dike and occasionally move water, primarily for flood-control purposes, from manmade canals located south of Lake Okeechobee to the lake. The canals and lake are part of "the waters of the United States" within the meaning of the CWA. The water in the canals contains pollutants from runoff of surrounding agricultural, industrial, and residential areas. *Id.* at 4a. The pumps themselves do not add any pollutants. *Id.* at 5a.

3. a. In 2002, petitioners in No. 10-196 filed citizen suits in federal district court against SFWMD, alleging that SFWMD's operation of pump stations S-2, S-3, and S-4 without an NPDES permit violates the CWA. The two suits were consolidated, and petitioner in No. 10-252 intervened as a plaintiff. The United States and a private company intervened as defendants, and petitioners added SFWMD's executive director as a defendant. Pet. App. 5a, 54a-56a.

b. In 2003, the district court stayed proceedings in this case pending this Court's review of the Eleventh Circuit's decision in *Miccosukee Tribe of Indians* v. *SFWMD*, 280 F.3d 1364 (2002), vacated and remanded, 541 U.S. 95 (2004).

Like the present case, *Miccosukee* arose from a CWA citizen suit filed against SFWMD alleging that an NPDES permit is required for SFWMD's operation of a pump station (known as S-9) that is located within the Project and transports water from a canal to a wetland area called WCA-3. 541 U.S. at 100. The Eleventh Circuit held that an NPDES permit was required. 280 F.3d at 1368-1369. This Court granted SFWMD's petition for a writ of certiorari on the question "[w]hether the pumping of water by a state water management agency that adds nothing to the water being pumped constitutes an 'addition' of a pollutant 'from' a point source." 541 U.S. at 104 (quoting Pet. at I, *Miccosukee*, *supra*). The United States, as amicus curiae, argued that the point source itself need not be the original source of the pollutant to trigger the NPDES permit requirement. *Id.* at 104-105. This Court agreed, explaining that the CWA term "point source" includes structures that do not themselves emanate or generate pollutants. *Ibid.*

The United States, however, raised an independent basis for concluding that the operation of S-9 did not require an NPDES permit. Relying on the CWA's language and structure, as well as EPA's longstanding practice, the United States argued that the transfer of water from one body of navigable waters to another without alteration or an intervening use is not an addition of pollutants to the waters of the United States that Congress intended to subject to the NPDES program. U.S. Amicus Merits Br. 15-28, *Miccosukee*, *supra*. This

Court did not pass on that argument, expressly leaving it open to the parties to raise on remand. 541 U.S. at 109, 112.[2]

On remand, the district court stayed the *Miccosukee* case pending resolution of the present case. *Miccosukee Tribe of Indians* v. *SFWMD*, 559 F.3d 1191, 1194 (11th Cir. 2009).

4. Following this Court's decision in *Miccosukee*, respondents (including the United States) pressed in this case the argument that the Court did not decide in *Miccosukee*—*i.e.*, that a transfer of water from one body of navigable waters to another does not require an NPDES permit. The district court rejected that contention and concluded that operation of pump stations S-2, S-3, and S-4 without an NPDES permit violated the CWA. Pet. App. 53a-202a.

In relevant part, the district court held that the CWA unambiguously requires an NPDES permit for a transfer of water containing pollutants from one body of navigable waters to another, even if the water is not altered or put to an intervening use. Pet. App. 154a-170a. The court noted that EPA had proposed a regulation clarifying that such water transfers are not subject to regulation under the NPDES permitting program. *Id.* at 168a; see 71 Fed. Reg. 32,887 (2006). The court found it unnecessary to determine the level of deference to accord EPA's interpretation, however, because it concluded

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[2] The Court further held that an NPDES permit is not required to convey water within a single water body. *Miccosukee*, 541 U.S. at 109-110. Based on its determination that further development of the factual record was necessary to resolve whether the canal and WCA-3 are "meaningfully distinct water bodies," the Court vacated the Eleventh Circuit's judgment and remanded the case for further proceedings. *Id.* at 112.

that Congress clearly intended to require NPDES permits for water transfers. Pet. App. 169a-170a.[3] The district court subsequently granted an injunction requiring the executive director of SFWMD to apply for an NPDES permit. *Id.* at 41a-52a.[4]

5. While appeals from the district court's judgment were pending, EPA promulgated a final regulation providing that a water transfer—defined as "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use"—does not require an NPDES permit. 73 Fed. Reg. 33,697 (2008) (40 C.F.R. 122.3(i)). The water-transfer rule creates an exclusion for water transfers from the NPDES permitting regime. *Ibid.* The exclusion "does not apply to pollutants introduced by the water transfer activity itself to the water being transferred." *Ibid.* The final rule was nearly identical to the proposed rule that EPA had published two years earlier, which in turn had been based on an August 2005 interpretive memorandum by EPA reaching the same conclusion. 73 Fed. Reg. at 33,699.

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[3] Respondents also contended that the canals and Lake Okeechobee are not meaningfully distinct water bodies and that water transfers between them thus do not require an NPDES permit. See note 2, *supra*. After a three-month bench trial, the district court found that the canals and lake are meaningfully distinct. Pet. App. 170a-177a. Based on the district court's findings of fact with respect to that issue, the court of appeals stated that it was "satisfied that the agricultural canals and Lake Okeechobee are meaningfully distinct water bodies." *Id.* at 10a n.4.

[4] The district court dismissed SFWMD from the case on Eleventh Amendment grounds. Pet. App. 178a-200a. The court of appeals dismissed petitioners' cross-appeal of that ruling as moot because the remedy petitioners sought applied equally against SFWMD's executive director. *Id.* at 6a-10a.

6. a. The court of appeals reversed. Pet. App. 1a-38a. In light of EPA's intervening regulation, the court of appeals applied the two-step framework described in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984), to determine whether a water transfer requires an NPDES permit. Pet. App. 10a-37a.

At step one of its *Chevron* analysis, the court of appeals applied "the traditional tools of statutory construction," including an examination of the CWA's text, structure, purpose, and legislative history, and determined that there are two reasonable interpretations of the term "discharge of a pollutant" as applied to water transfers. Pet. App. 25a-36a. Under one interpretation, the court stated, the term means "any addition . . . to [any] navigable waters," such that a water transfer constitutes a discharge because it adds a pollutant to the receiving body of water. *Id.* at 36a (brackets in original). Under the other interpretation, the court stated, the term means "any addition . . . to navigable waters [as a whole]," such that a water transfer does not constitute a discharge because the pollutant is already in the waters of the United States. *Ibid.* (brackets in original). The court concluded that both interpretations are plausible and that the statute therefore is ambiguous on the question whether a water transfer is a "discharge of a pollutant" that requires an NPDES permit. *Ibid.*

Proceeding to step two of *Chevron*, the court of appeals held that EPA's water-transfer rule is permissible and thus controlling. Pet App. 36a-37a. "Because the EPA's construction is one of the two readings we have found is reasonable," the court explained, "we cannot say that it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Ibid.* (quoting *Chevron*, 467 U.S. at 844). The court added that, "[u]nless and until the

EPA rescinds or Congress overrides the regulation, we must give effect to it." *Id.* at 37a.

b. Petitioners filed petitions for rehearing and rehearing en banc. In its response to those petitions, the United States noted that EPA intends to reconsider the water-transfer rule. Gov't C.A. Reh'g Br. 15 (filed Oct. 9, 2009). On May 7, 2010, the court of appeals denied the petitions. Pet. App. 203a-204a.

DISCUSSION

The court of appeals correctly held that the CWA does not unambiguously resolve the question whether an NPDES permit is required for water transfers, and that EPA's 2008 regulation is a permissible construction entitled to *Chevron* deference. That decision does not conflict with any decision of this Court or of another court of appeals. Although the First and Second Circuits have held that an NPDES permit is required for water transfers, those cases were decided before EPA promulgated the water-transfer rule. The First and Second Circuits therefore had no occasion to apply the *Chevron* framework to EPA's 2008 regulation or to consider whether the agency's position reflects a reasonable interpretation of the statute. Moreover, as the government explained in its response to the rehearing petitions filed in the Eleventh Circuit, EPA is in the process of reconsidering its water-transfer rule. Accordingly, further review is not warranted at this time.

1. The decision of the court of appeals is correct. Under this Court's established two-step framework for reviewing an agency regulation that interprets a federal statute, a court first asks whether the statute directly speaks to the precise question at issue. If so, the court must give effect to the unambiguously expressed intent

of Congress. If not, the court proceeds to step two and asks whether the agency interpretation is a permissible construction of the statute. So long as it is reasonable, the agency regulation must be upheld. See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). As the Eleventh Circuit held (Pet. App. 25a-37a), the CWA is ambiguous as to whether a water transfer is subject to the NPDES permit requirement, and EPA's 2008 rule is a permissible construction entitled to *Chevron* deference.

a. Under *Chevron* step one, a statute is ambiguous if, after application of the traditional tools of statutory construction, it is "capable of being understood in two or more possible senses or ways." *Chickasaw Nation* v. *United States*, 534 U.S. 84, 90 (2001) (citation omitted). That is the case here. Contrary to petitioners' contention (10-196 Pet. 16-29; 10-252 Pet. 13-20), the CWA does not unambiguously compel the interpretation that water transfers require an NPDES permit.

CWA Section 301(a) requires an NPDES permit for the "discharge of any pollutant," defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1311(a), 1362(12)(A). As relevant here, that phrase may reasonably be read in at least two different ways. As petitioners acknowledge (10-196 Pet. 18-19), the term "navigable waters," in ordinary usage, can refer either to "individual water bodies" or to "a collective whole." See Pet. App. 26a-27a. Similarly, the word "addition" is a general term that leaves discretion for the agency to interpret in this context. See, *e.g.*, *National Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982) (holding that EPA had discretion to define "addition").

On the one hand, the CWA refers in certain places to "*any* navigable waters," suggesting that the term "navigable waters" contemplates distinct water bodies. *E.g.*, 33 U.S.C. 1254(a)(3); 33 U.S.C. 1314(f)(2)(F) (emphasis added). In considering 33 U.S.C. 1362(12)(A) (defining the term "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source"), petitioners suggest that Congress's use of the prepositions "from" and "to" further shows that only the status of the receiving body of water matters. 10-196 Pet. 19. Under that reading, any discharge of pollutants to a navigable water body would constitute an "addition" to "navigable waters," even if the pollutant was merely transferred via water from another navigable water body.

On the other hand, the modifier "any" does not appear before "navigable waters" in Section 301(a). Moreover, the CWA defines "navigable waters" as "*the* waters of the United States." 33 U.S.C. 1362(7) (emphasis added). The absence of "any," combined with use of the definite article "the," supports the view that the term "navigable waters" in Section 301(a) refers to a unitary whole—*i.e.*, to all of "the waters of the United States" taken together. Under that interpretation, a water transfer is not a "discharge of a pollutant" because the pollutant is already part of "the waters of the United States" and therefore is not "add[ed]" to "the waters of the United States" by virtue of the transfer. Because the CWA's text does not unambiguously mandate either of the two competing constructions, the court of appeals correctly concluded (Pet. App. 25a-30a) that the text does not resolve the question whether an NPDES permit is required in this setting.

The broader statutory context, including the CWA's structure, purpose, and legislative history, does not alter that conclusion. See Pet. App. 30a-36a. Petitioners argue that because the CWA allows States to develop water-quality standards for individual bodies of water (33 U.S.C. 1313(c)(2)), and because water transfers could affect compliance with such standards in the receiving water body (33 U.S.C. 1313(d)), NPDES permits must be required. 10-196 Pet. 24-26 (citing *Miccosukee*, 541 U.S. at 107). Petitioners also contend (*id.* at 27) that allowing water transfers without NPDES permits would undermine the Act's purpose: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a).[5]

Petitioners, however, ignore other aspects of the CWA's regime that contemplate activities affecting the water quality of individual water bodies that arguably fall outside the scope of the NPDES program. In particular, Congress specified that "the authority of each State to allocate quantities of water within its jurisdic-

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[5] Petitioners further argue (10-196 Pet. 23) that the Act's regulation of discharges of "dredged spoil" under the Section 404 permitting program, see 33 U.S.C. 1344, would be rendered "irrelevant" under EPA's interpretation because dredged spoil "inherently comes from" navigable waters. That argument lacks merit. Dredged spoil consists of material such as soil, sand, and vegetation excavated from the bottom of a waterbody or wet area. 40 C.F.R. 232.2; 33 C.F.R. 323.2(c); see *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 924 n.43 (5th Cir. 1983). Such materials are not pollutants while in their original place; rather, they become pollutants only when they are excavated. Dredged spoil therefore is not "inherently" part of the waters of the United States, and Section 404 permits are still required for discharges of dredged material. As EPA made clear in promulgating the 2008 regulation, its water-transfer rule does not affect the Section 404 permitting program. See 73 Fed. Reg. at 33,703.

tion shall not be superseded, abrogated or otherwise impaired by [the Act]." 33 U.S.C. 1251(g). Section 304(f), which concerns nonpoint sources of pollution, discusses control of pollution from, *inter alia*, "changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. 1314(f)(2)(F). Although such activities are not exclusively nonpoint source in nature, Section 304(f) is focused primarily on sources outside the scope of the NPDES program. 73 Fed. Reg. at 33,702. Accordingly, while the stated purpose of the CWA is to protect the waters of the United States, the Act does so within the framework of federal-state cooperation and not exclusively through operation of the NPDES permitting program.

Because the traditional tools of statutory construction do not unambiguously compel the conclusion that water transfers are subject to the NPDES permit program, the court of appeals correctly proceeded to step two of the *Chevron* analysis. Pet. App. 36a.[6]

b. Under *Chevron* step two, EPA's regulation is controlling "if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp.* v. *Riverkeeper, Inc.*, 129 S. Ct. 1498, 1505 (2009); see *National Cable & Telecomms.*

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[6] The CWA's legislative history reinforces the conclusion that the Act does not compel petitioners' interpretation. See 73 Fed. Reg. at 33,703; *Gorsuch*, 693 F.2d at 173 (finding strong signals in the legislative history that Congress "entrusted EPA with at least some discretion over which 'pollutants' and sources of pollutants were to be regulated under the NPDES program" and "generally intended that EPA would exercise substantial discretion in interpreting the Act").

Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (*Brand X*) (filling statutory gaps involves policy choices that agencies are better equipped to make than are courts); *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996) ("the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency"). EPA's 2008 regulation reflects a permissible construction of the CWA that the government had previously endorsed both in prior litigation and in EPA's administrative practice. See, *e.g.*, U.S. Amicus Merits Br. 15-28, *Miccosukee*, *supra*; 73 Fed Reg. 33,699 (citing 2005 EPA legal memorandum and 2006 proposed rule); cf. *Gorsuch*, 693 F.2d at 173; *National Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 584 (6th Cir. 1988). Moreover, the preamble to the current water-transfer rule sets forth in detail a reasoned explanation of how the CWA supports the agency's construction. See 73 Fed. Reg. at 33,700-33,706. The Eleventh Circuit therefore correctly explained that, whether or not the court would have adopted the same construction in the absence of an official agency position, EPA's interpretation is at least reasonable and is therefore entitled to deference under the principles announced in *Chevron*. Pet. App. 36a-38a.

c. Petitioners contend (10-252 Pet. 24-33) that according *Chevron* deference to EPA's regulation violates administrative-law and separation-of-powers principles because the regulation was promulgated during the course of this litigation and has influenced its outcome. That argument lacks merit. This Court has repeatedly held that regulations otherwise entitled to *Chevron* deference do not lose that entitlement simply because they were adopted during or in direct response to litigation. See, *e.g.*, *Smiley*, 517 U.S. at 740-741 (according *Chev-*

ron deference to a rule adopted after, and in direct response to, the lower court decision in that case; it "does [not] matter that the regulation was prompted by litigation, including this very suit"); *Barnhart* v. *Walton*, 535 U.S. 212, 221 (2002); *United States* v. *Morton*, 467 U.S. 822, 835 n.21 (1984). In any event, as noted above (p. 14, *supra*), the position set forth in EPA's 2008 water-transfer rule is consistent with the agency's practice and policy preceding this litigation.

Nor is there merit in petitioners' contention (10-252 Pet. 24-27) that EPA's water-transfer rule loses its entitlement to *Chevron* deference simply because some lower courts previously had rejected the construction of the CWA that was set forth in that rule. In *Barnhart*, the agency's position had been rejected by other courts of appeals in decisions that preceded the promulgation of the regulation, and the agency's position had been rejected by the Fourth Circuit under *Chevron* step one based on that court's conclusion that the statutory language unambiguously precluded it. See 535 U.S. at 218-224; see also *Walton* v. *Apfel*, 235 F.3d 184, 191 n.10 (4th Cir. 2000), rev'd *sub nom. Barnhart* v. *Walton*, 535 U.S. 212 (2002). This Court nevertheless held that the statute was ambiguous, and it accorded *Chevron* deference to the agency regulation promulgated during the course of the litigation. *Id.* at 221. The Eleventh Circuit in this case was situated similarly to this Court in *Barnhart*. Here, the district court rejected the agency's position on the ground that the statute is unambiguous, Pet. App. 154a-170a, but the court of appeals reversed, concluding that the statute is ambiguous and that EPA's recently promulgated regulation is entitled to *Chevron* deference, *id.* at 1a-38a.

Petitioners' argument also cannot be reconciled with *Brand X*, *supra*. In that case, the court of appeals declined to apply *Chevron* to the agency's regulation because the court viewed itself as bound by its own contrary construction of the statute in a prior case. 545 U.S. at 982. This Court rejected that reasoning. It explained that judicial precedent could foreclose the subsequent agency interpretation only if the court in the prior case had held that the statute unambiguously required the competing construction. *Id.* at 982-985.

In this case, no binding precedent prevented the court of appeals from reviewing and upholding EPA's water-transfer rule under the two-step approach set forth in *Chevron*. The district court's decision in this case was not binding on the Eleventh Circuit. Further, the prior decisions of the First and Second Circuits on which petitioners rely, which held NPDES permitting requirements applicable to water transfers of the sort at issue, neither foreclosed EPA from adopting a contrary approach nor foreclosed the Eleventh Circuit from upholding the agency's interpretation. See *Dubois* v. *United States Dep't of Agric.*, 102 F.3d 1273 (1st Cir. 1996), cert. denied, 521 U.S. 1119 (1997); *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of N.Y.*, 273 F.3d 481 (2d Cir. 2001) (*Catskill I*); *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of N.Y.*, 451 F.3d 77 (2d Cir. 2006), cert. denied, 549 U.S. 1252 (2007) (*Catskill II*). As discussed further below (pp. 19-20, *infra*), the First and Second Circuits had no occasion to address the precise question presented here—*i.e.*, whether EPA's 2008 regulation survives appropriately deferential review under the two-step *Chevron* framework—because those cases were decided before that regulation was promulgated. In any event, those deci-

sions were not binding on the Eleventh Circuit in this case.

There is likewise no merit to petitioners' related contention (10-252 Pet. 28-33) that the decision below conflicts with *United States* v. *Klein*, 80 U.S. 128 (1871). In *Klein*, this Court addressed a federal statute mandating that a presidential pardon be treated as proof that the pardoned individual had given aid or comfort to the Civil War rebellion. The Court held that the law was unconstitutional because it purported to prescribe rules of decision in a case pending before the judiciary, and because it impaired the effect of a pardon, thereby infringing on the constitutional authority of the executive. *Id.* at 146-148. Since *Klein*, however, the Court has recognized that Congress may change the applicable law during and in response to litigation, and that such amendments may validly affect the outcome of pending lawsuits, so long as Congress does not direct a court to make specific factual findings or to reach a specific result in a pending case. See, *e.g.*, *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 438-439 (1992); *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) ("Whatever the precise scope of *Klein*, * * * later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'") (quoting *Robertson*, 503 U.S. at 441).

Klein is inapposite here for several reasons. First, *Klein* pertains to congressional legislation, and no intervening legislation is involved in this case. Rather, in promulgating the water-transfer rule, EPA exercised well-recognized agency authority (see p. 15, *supra*) to clarify ambiguous statutory terms whose meaning is at issue in pending litigation. Second, EPA's water-transfer rule is a regulation of general applicability that does

not mandate particular factual findings or specific results in this or any other case. Third, EPA's promulgation of the water-transfer rule did not have the effect of "usurping" the judicial function of the court of appeals. 10-252 Pet. 31-33. Before deferring to the regulation under *Chevron*, the court of appeals held, based on its own analysis of the statute, that the CWA is ambiguous on the question presented and that the district court erred in concluding otherwise.

As this Court has explained, deference to agency regulations is appropriate because "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones." *Chevron*, 467 U.S. at 866. In this case, the CWA's overall scheme indicates that Congress intended to vest EPA with significant discretion, and the water-transfer rule is a permissible exercise of that discretion. Thus, rather than vindicating separation-of-powers principles, acceptance of petitioners' position would improperly shift from the agency to the courts the primary responsibility for resolving ambiguities in the CWA's text.[7]

2. a. Contrary to petitioners' contention (10-252 Pet. 8, 10-11), the decision of the court of appeals does not conflict with this Court's decision in *Miccosukee*. In *Miccosukee*, this Court held that a discharge subject to NPDES permitting requirements may occur even when

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[7] Although EPA promulgated the final water-transfer rule after initial briefing in the court of appeals had been completed, petitioners could have raised their separation-of-powers objections in their petitions for rehearing and rehearing en banc. They did not do so. This Court ordinarily does not consider issues neither raised before nor considered by the lower courts. See, *e.g.*, *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) (collecting cases).

the relevant point source is not itself the source of the pollutant. 541 U.S. at 104-105. The Court declined, however, to decide the separate question whether water transfers from one body of navigable waters to another require NPDES permits, and instead expressly left that issue open to be raised on remand. *Id.* at 109 ("[W]e decline to resolve it here. * * * [T]he unitary waters argument will be open to the parties on remand."); *id.* at 112 ("[T]he Government's broader 'unitary waters' argument is open to the District on remand."). The Court also noted the absence of any EPA administrative document to which deference could be accorded. *Id.* at 107. The Court thus had no occasion to consider, let alone resolve, the *Chevron*-based issues decided below.

b. The Eleventh Circuit's decision does not conflict with any decision of another court of appeals. As noted above, the First and Second Circuits have held that NPDES permits were required for particular water transfers. See *Dubois*, *supra*; *Catskill I*, *supra*; *Catskill II*, *supra*. Because those cases were decided before promulgation of EPA's water-transfer rule, however, the courts did not approach the issue through the lens of *Chevron*. To the contrary, the First and Second Circuits specifically stated that the *Chevron* framework was inapplicable because there was no formal EPA interpretation potentially entitled to *Chevron* deference. *Catskill I*, 273 F.3d at 490 ("If the EPA's position had been adopted in a rulemaking or other formal proceeding, [*Chevron*] deference * * * might be appropriate."); *Catskill II*, 451 F.3d at 82, 83 n.5 (EPA guidance memorandum not in form entitled to *Chevron* deference); *Dubois*, 102 F.3d at 1285 n.15 (*Chevron* "does not apply * * * because we are not reviewing an agency's interpretation of the statute that it was directed to enforce.");

see also *Miccosukee Tribe of Indians* v. *SFWMD*, 280 F.3d 1364, 1367 n.4 (11th Cir. 2002) (court could "ascertain no EPA position * * * to which to give *any* deference, much less *Chevron* deference"), vacated and remanded, *Miccosukee*, 541 U.S. at 107, 109.

As discussed above (p. 16, *supra*), this Court has held that a court must defer to a regulation otherwise entitled to *Chevron* deference, even if it is inconsistent with the court's own prior statutory interpretation, unless the prior decision was based on the unambiguous terms of the statute. See *Brand X*, 545 U.S. at 982-985. In neither *Dubois* nor the *Catskill* cases did the court of appeals hold that the CWA unambiguously requires an NPDES permit for a water transfer. See *Catskill I*, 273 F.3d at 490; *Catskill II*, 451 F.3d at 82, 83 n.5; *Dubois*, 102 F.3d at 1285 n.15. Accordingly, under *Brand X*, the question whether EPA's water-transfer rule is valid remains open in the First and Second Circuits. As the Eleventh Circuit explained, the courts in *Dubois* and the *Catskill* cases "decided only how best to construe the statutory language—not whether that language is ambiguous and could reasonably be construed another way." Pet. App. 24a. On the latter question, which is the only one that matters in light of EPA's 2008 rule, there is no conflict among the courts of appeals.

3. In its response to petitioners' rehearing petitions in the court of appeals, the government explained that EPA intends to reconsider its current water-transfer rule. Gov't C.A. Reh'g Br. 15. If EPA ultimately decides to change the rule, any tension among the aforementioned cases presumably would be eliminated. The

possibility of such a change provides an additional reason for this Court to deny review.[8]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2010

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[8] To be sure, if EPA promulgates a regulation that requires NPDES permits for water transfers between distinct bodies of navigable waters, that regulation may be challenged in court. At the present time, however, any dispute as to the permissibility of such a regulation is purely hypothetical. This case would be an inappropriate vehicle to decide whether EPA could lawfully issue a different water-transfer rule that it has not actually promulgated.

173 (6) (3)

Nos. 10-196 & 10-252

SUPREME COURT, U.S.
FILED
OCT 22 2010

In The
Supreme Court of the United States

FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION; and FISHERMEN AGAINST DESTRUCTION OF THE ENVIRONMENT,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT; CAROL WEHLE, Executive Director; UNITED STATES OF AMERICA and U.S. SUGAR CORPORATION,

Respondents.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT; CAROL WEHLE, Executive Director; UNITED STATES OF AMERICA and U.S. SUGAR CORPORATION,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR RESPONDENTS SOUTH FLORIDA WATER MANAGEMENT DISTRICT AND CAROL WEHLE, AS ITS EXECUTIVE DIRECTOR

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QUESTION PRESENTED

Congress carefully crafted the Clean Water Act's complex regulatory structure to achieve clean water *while* preserving the primacy of the States' authority over water resources. This case concerns the proper interpretation of the statutory text and cooperative federalism scheme that resulted.

The South Florida Water Management District necessarily operates a vast water control system that regularly transfers and, as a result, discharges navigable waters to implement State water resource policies. Congress was focused upon industrial and municipal wastes when it declared the "discharge of any pollutant" illegal absent a federal permit. Such discharges occur upon the "addition of any pollutant to navigable waters." Other sources of pollution, including other types of "discharges," were left to be addressed other ways.

The Eleventh Circuit's answer to the following question of great national importance is not consistent with decisions of this Court and reveals confusion among the lower courts and the executive department:

> Is it permissible to read the Clean Water Act – consistent with relevant cannons of construction – to criminalize unpermitted "discharges of navigable waters" from State facilities used solely to move the waters for public purposes and that introduce nothing to them?

RULE 29.6 STATEMENT

Respondent South Florida Water Management District is a governmental entity of the State of Florida created by Florida Statutes § 373.069(e).

Respondent Carol Wehle is an individual appearing as the Executive Director of the Respondent South Florida Water Management District.

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STATEMENT

The fundamental issue in this case is whether a state water management agency may lawfully transfer, and as a result, discharge navigable waters to which it adds nothing, without the need for a federal National Pollutant Discharge Elimination System ("NPDES") permit or, conversely, whether the Clean Water Act's ("CWA") NPDES program reaches such traditionally local, vital water management activities. To regulate water management under a federal program designed to eliminate waste discharges would fundamentally alter the federal-state balance stricken by the CWA's cooperative federalism structure.

Congress plainly never intended to criminalize public water transfers or to extend federal NPDES permitting jurisdiction over them. The Eleventh Circuit's finding that it is permissible to read the Act otherwise squarely contradicts relevant decisions of this Court. As a result, the appellate court has given the Environmental Protection Agency discretion where Congress did not. Discretion the agency has already indicated, in its response to petitions for rehearing below, that it intends to exercise. The Agency has since established a task force and is developing a strategy to expand the NPDES. Allowing the Executive Department to be arbiter of its own jurisdiction, without clear direction from Congress, flies in the face of the distinct federal and state roles Congress carefully delineated to preserve the primacy of State authorities. Whatever regulatory certainty

the CWA and the Rule once provided the Nation is gone. Water managers nationwide are stymied by these events.

For these and other important reasons expounded below, these non-federal Respondents respectfully encourage review on certiorari and suggest it is incumbent upon the Court to replace the Eleventh Circuit's errant deference-based rationale[1] with a properly reasoned judicial position that is consistent with directly applicable interpretive doctrines of this Court.

1. Public Water Transfers.

Respondent Carol Wehle is the Executive Director of the Respondent South Florida Water Management District, one of five districts established by the State to provide stewardship over public water resources. The District implements State and Local water policies throughout its extensive jurisdiction, which is larger than the States of Connecticut, Maryland and Rhode Island combined. It is drawn along hydrologic boundaries, to allow a comprehensive watershed approach to managing the Everglades ecosystem. Fla. Stat. §§373.016; 373.069(2)(e). The

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[1] Respondents concede to have, as a fallback argument, supported deference in the past. Deference, however, results from an inferior interpretive analysis that ignores proper linguistic analysis and, more critically, relevant canons of construction discussed herein.

Respondents' complicated mission is to protect water resources of the region by balancing and improving water quality, flood control, natural systems and water supply. These are traditional State functions that entitle the Water Management District to protections of the Eleventh Amendment of the United States Constitution.

The imposition of NPDES strictures is a grave concern to State and Local water managers nationwide[2] and these respondents particularly. The pump stations involved here are but three of 391 water control structures and hundreds of miles of canals and levees that comprise the U.S. Army Corps of Engineer's Central & Southern Florida Project for Flood Control and Other Purposes (C&SF) – the country's largest – for which the SFWMD is the local sponsor.[3] The specter of applying NPDES to the C&SF threatens to impede local control of water management and land use decisions and to divert scarce resources from a joint federal and state multi-billion dollar, multi-agency effort to re-plumb the C&SF project to restore the Florida Everglades and

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[2] Those concerns are extensively documented by hundreds of comments provided during EPA's rulemaking (located at: www.regulations.gov under Docket No. EPA-HQ-OW-2006-0141) and by dozens of amicus curiae that have participated at all stages of this case and in the related matters discussed, *infra*, Statement Part 3 at p. 5.

[3] Fla. Stat. §373.1501(4); *see*, Comprehensive Report on Central and Southern Florida for Flood Control and Other Purposes, H.R. Doc. No. 80-643 (1948).

develop south Florida's water resources. *See* Brief of the United States in *S. Fla. Water Mgmt. Dist. v. Miccosukee*, No. 02-626, 2003 WL 22137034 at *14 (U.S. Sept. 10, 2003) ("mistaken imposition of NPDES permitting requirements . . . is unlikely to provide any substantial environmental benefits. Rather, it would likely misdirect governmental resources and potentially hinder the Everglades restoration process").

Flow diversions accomplished by the District's pumps are categorized as "water transfers" because their operation merely "conveys and connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use." 40 C.F.R. §122.3(i) (2008). Public facilities used to move water are an "integral component of U.S. infrastructure." National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33697, 33699 col. 1 (June 13, 2008) codified at 40 C.F.R. pt. 122 ("Water Transfers Rule"). Thousand of water transfers are routinely conducted by federal, state, and local agencies across the United States for millions of people who depend upon them daily for public water supply, irrigation, power generation, flood control and environmental restoration. *Id.* at 33698 col. 2&3. Since enactment of the Clean Water Act, the EPA has consistently understood that an NPDES pollutant is "added" upon its introduction from outside the navigable waters or, conversely, that NPDES is not triggered when navigable waters containing pollutants

are connected and conveyed, i.e. when waters are merely moved between and among themselves. *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982).

2. Proceedings Below.

The South Florida Water Management District was dismissed after a finding that its water transfers constitute a traditional State Function which entitled it to Eleventh Amendment protections. Carol Wehle, its Executive Director, was joined as a defendant under *Ex Parte Young*[4] and ordered to apply for NPDES permits.

In the decision for which review on certiorari is sought, the court of appeals reversed the judgment imposing NPDES and held moot Petitioners' cross appeal of the District's dismissal. Under Rule 12 of this Court, both the District and its Executive Director are Respondents entitled to file documents.

3. Related Litigation.

Several pending matters are directly related to this case and will largely be determined by it. The first case, in which this Court declined to decide

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[4] The *Ex Parte Young* doctrine allows State officers and employees to be sued for prospective injunctive relief, despite the 11th Amendment, to prevent ongoing violations of federal law. 209 U.S. 123 (1908).

the question presented here, *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, remains pending on remand. 541 U.S. 95 (2004). EPA withdrew a motion to intervene in *Miccosukee* when it became clear this appeal would proceed first. The trial court stayed the case after extensive discovery and pretrial proceedings but shortly before an extensive trial in recognition that this case can and should finally resolve the parties' primary legal dispute.

In 2008, twenty-three petitions were filed to challenge the Water Transfers Rule in the First, Second, Third, Sixth and Eleventh Circuit Courts of Appeals and in the Southern District Courts[5] of New York and Florida. The United States Judicial Panel on Multidistrict Litigation transferred to the Eleventh Circuit those petitions that were filed with the Courts of Appeals. Like *Miccosukee,* these rule challenges have also been stayed in anticipation of a dispositive decision in this case.

In 2002, New York City became the only public water manager, Respondents aside, ever required by a court to obtain an NPDES permit for water transfers. *Catskill Mountains Chapter of Trout Unlimited Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ("*Catskill I*"). Over the ensuing years, continuous litigation resulted in multi-million dollar civil

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[5] Challenges were brought in both District and Appeals Courts because of a question, not relevant here, regarding original jurisdiction.

penalties and hundreds of thousands of dollars in attorneys' fees and costs. *Catskill Mountains Chapter of Trout Unlimited Inc. v. City of New York*, 244 F. Supp.2d 41, 57 (N.D. N.Y. 2003). Further administrative and state court proceedings, vacated the initial permit for authorizing deviations from required effluent limitations and remanded for the City to seek variances (which the permitting agency had never before issued). *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, 71 A.D. 3d 235 (N.Y. 2010). Today, ten years after the City was sued, it remains uncertain whether New York can comply with NPDES. Its attempts to obtain a final permit continue and will inevitably lead to further litigation. The Second Circuit's conjecture that the NPDES program contains sufficient "flexibility," to assure that important State transfers can be authorized, has proven more complicated in practice. *See Catskill Mountains Chapter of Trout Unlimited Inc. v. City of New York*, 451 F.3d 77, 85 (2d Cir. 2006) ("*Catskill II*"). The burden of misapplying NPDES to water transfers weighs heavily upon public water managers.

REASONS FOR GRANTING REVIEW

While concurring with the Eleventh Circuit's judgment, Respondent Water Managers concede this case amply satisfies the Court's criteria for certiorari review. The Petitions correctly point out that an important federal question regarding the proper interpretation of a major federal regulatory program

is squarely and concisely presented. The question has confounded those courts that have addressed it. Their decisions have yielded inconsistent interpretive approaches and almost uniformly ignored the cooperative federalism principles discussed here. The Executive Department is in similar disarray. Different administrations cannot even agree whether the EPA has been consistent in its views over the years[6] and, now, disagree whether the CWA is ambiguous on the question presented.

After decades in court defending the position EPA codified after years of rulemaking, the Executive Department surprised the Nation, in this case, with the extraordinary declaration that it "in fact intends to reconsider the rule." Federal Response to Motions for Reconsideration En Banc, below, at 15. That singular filing quashed whatever regulatory certainty the Rule purported to provide. A proper interpretation by this Court would end many more years of ongoing and inevitably recurring litigation and rulemaking. Most importantly, it would provide much needed clarity for thousands of state and local water managers who must plan and account for each state's ever changing and complex water and land resource needs during increasingly tough economic times.

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[6] *Cf.* Brief of Former EPA Administrators in *S. Fla. Water Mgmt. Dist. v. Miccosukee*, No. 02-626, 2003 WL 22793539 (U.S. Nov. 14, 2003) and the Water Transfers Rule at 33701 Col. 2.

A critical basis for review not revealed by the Petitions but of utmost concern to these Respondents is that the lower court's rationale conflicts with relevant decisions of this Court. Key canons of statutory construction were misapplied or altogether ignored. Had the lower court followed this Court's guidance and direction, it would have adopted the CWA's only permissible reading, and not deferred. For when properly construed, the plain text, cooperative-federalism structure and principles of lenity – the latter two of which the lower court flatly disregarded – defy attributing to Congress any intent to criminalize unpermitted discharges of the type involved here.

The lower court's deference-based rationale is particularly problematic given that – in the name of cooperative federalism – Congress intentionally delimited federal jurisdiction for the express purpose of preserving States' rights and responsibilities for water and land resource management. 33 U.S.C. §1251(b) & (g). Under today's *Chevron* doctrine, the EPA now views itself free to extend its own jurisdiction well beyond express limits that the Executive Department has often and for decades repeatedly acknowledged were intended by Congress to protect the States. EPA assumed, in its objections to rehearing below, that the Rule, and thus the law, is up for grabs with each change of administration.

By resorting to deference in a cooperative federalism context where deference has no proper place, the lower court further muddied the Clean Water Act and

with it the nationwide regulatory landscape. Congress never delegated to EPA the discretion to redraw the roles the CWA so carefully defined for the federal and state governments. That intrusion, authorized by the Eleventh Circuit, is antithetical to the CWA's core structure.

I. THE ELEVENTH CIRCUIT'S DECISION TO DEFER TO THE EXECUTIVE DEPARTMENT CONFLICTS WITH DECISIONS OF THIS COURT.

Decisions of this Court have set forth relevant interpretive rules that, when faithfully considered, proscribe Petitioners' reading of the CWA and, thus, deference to EPA. Three approaches – misapplied or ignored by the Eleventh Circuit – should have guided its review. First, the linguistic analysis anticipated by *S.D. Warren, Co. v. Me. Bd. of Envtl. Prot.*, yields a singular "ordinary or natural" plain meaning of the relevant limiting language. 547 U.S. 370, 376 (2006). The Eleventh Circuit erred by not giving full effect to a determinative prepositional clause. Second, regardless of whether the Court accepts outright the linguistic approach *Miccosukee* dubbed "unitary waters,"[7] the Eleventh Circuit erred by leaping to deference without yielding to clear statement principles of the Tenth Amendment to the United States Constitution. Principles that were specifically devised

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[7] *Miccosukee*, 541 U.S. at 96.

by this Court for these very circumstances, *i.e.*, to resolve ambiguities in favor of protecting and preserving States' rights and responsibilities. Third, the CWA criminalizes pollutant discharges, implicating this Court's rules of lenity that should equally have constrained the lower court. Before resorting to *Chevron*, courts must exhaust these canons of construction that are intended to guide the determination of whether a statute appropriately lends itself to more than one *permissible* reading.[8] Here the Clean Water Act does not.

In short, nothing in the Act manifests Congressional intent to federally permit State and Local water transfers and to criminalize those that are not. Absent a clear statement of intent to do so, the court erred in finding "reasonable" an interpretation that, when applied, greatly expands federal criminal liability and vests EPA with the apparent authority to re-adjust, at its discretion, the federal-state balance that Congress so carefully struck in creating the CWA.

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[8] Various commentators have debated whether the clear statement and lenity principles discussed herein should be applied: 1) before reaching *Chevron's* domain (Step Zero), 2) under *Chevron*'s Step One, when determining whether the statute is "ambiguous," 3) under Step Two when determining "reasonableness," and 4) or, advocating that *Chevron* has only One Step, when deciding generally whether there is more than one "permissible" reading. Whichever analytical construct, or variation thereof, the Court invokes, the canons discussed here preclude deference in this case.

A. Linguistic Analysis under *S.D. Warren*.

Not long ago, the Court reiterated the need to use great care when construing the CWA:

> It should also go without saying that uncritical use of interpretive rules is especially risky in making sense of a complicated statute like the Clean Water Act, where technical definitions are worked out with great effort in the legislative process. H.R. Rep. No. 92-911, p. 125 (1972) ("[I]t is extremely important to an understanding of [NPDES] to know the definition of the various terms used and a careful reading of the definitions . . . is recommended. Of particular significance [are] the words 'discharge of pollutants'").

S.D. Warren, 547 U.S. at 380. Indeed, when Congress fine-tunes its statutory definitions, it tends to do so with a purpose in mind. *Id.* at 384.

In *S.D. Warren,* the Court noted that the use of prepositional phrasing – "discharge of pollutants" as opposed to "discharge" – was plainly intended to distinguish the jurisdictional reaches of two key Clean Water Act programs. The subject of this case, NPDES – the narrower of those programs – is delimited by the terms "discharge of pollutants" and its definition: "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. §1362(7) & (12). The question presented turns upon the proper meaning of these few defining terms. *Friends* Pet. App. at 132a-133a. When carefully construed, the ordinary

and natural meaning of these terms with their definitions excludes water transfers from NPDES. The CWA is neither textually nor contextually ambiguous on the point.

1. Natural and Ordinary Meaning of the Relevant Prepositional Language.

Setting aside the policy arguments discussed below, the relevant linguistic and structural analysis in this case is straight-forward.

a. The triggering statutory term for NPDES "is not the word 'discharge' alone, but 'discharge of a pollutant,' a phrase made narrower by its specific definition requiring an 'addition' of a pollutant to the water. §1362(12)." *S.D. Warren*, 547 U.S. at 380-81. Since the term "addition" is neither defined in the statute nor a term of art, the courts are left to construe it in accordance with its "ordinary or natural" meaning. *See id.* at 376. The word is commonly understood as "the joining or uniting of one thing to another." Webster's Third New International Dictionary 24 (2002). In turn, the act of "joining or uniting" is commonly understood to require that the "thing" being joined must start apart from, or outside of the "thing" it joins, and be moved to it. It is neither natural nor ordinary, but rather bizarre, to say that two things already together are "joined or united" by the mere movement of one within the other.

There is no dispute in this case over the thing being "added." All navigable waters contain "pollutants" and, therefore, under Petitioners' "distinct waters" approach, become "pollutants" themselves. The relevant dispute here is over the thing "to" which the pollutant must be added or joined, *i.e.*, to what must a pollutant be joined to trigger NPDES? Congress plainly and clearly answered "to navigable waters," which it expressly defined for NPDES purposes to mean: "the waters of the United States." Inserting that definition, NPDES proscribes only those "additions" that join pollutants "to the waters of the United States."

It follows that NPDES does not apply unless a pollutant is moved from outside "the waters of the United States" into them. *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988); *Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982). NPDES cannot by the CWA's plain terms be triggered by the mere movement, redistribution or transfer of pollutants within "the waters of the United States." The Sixth Circuit explained that a "facility's movement of pollutants already in the water is not an 'addition' of pollutants to navigable waters of the United States." *Consumers Power*, 862 F.2d at 581, also at 586 (the pollutants "always remain within the waters of the United States, and hence cannot be added").

The United States' amicus brief in *Miccosukee* found this interpretation to be "clear" and further explained that Congress identified and referred to the

navigable waters "*as a whole for NPDES purpose*," an argument *Miccosukee* dubbed a "unitary waters" approach:

> Section 510(12) defines the "discharge of a pollutant" to include "*any* addition of *any* pollutant to navigable waters from *any* point source." 33 U.S.C. 1362(12) (emphasis added). Its use of the modifier "any" with reference to "addition," "pollutant," and "point source" expresses Congress's understanding that the various types of additions, pollutants, and point sources are all within the Clean Water Act's regulatory reach. The *absence* of the modifier "any" in conjunction with "navigable waters," by contrast, signifies Congress's further understanding that "the waters of the United States" should be viewed as a whole for purposes of NPDES permitting requirements. Once a pollutant is present in one part of "the waters of the United States," its simple conveyance to a different part is not a "discharge of a pollutant" within the meaning of the Act.

Brief of the United States in *Miccosukee* at *19; *see also Bates v. United States,* 522 U.S. 23, 29-30 (1997) (if "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (quotation marks omitted)).

Further textual confirmation of the "unitary waters" approach comes from the CWA's use of "the" before "waters of the United States." That definitive article has particularizing force when used before a noun and after a preposition. It ordinarily reflects an intention to refer to "the waters" as a whole, not to "a" water, "some" waters, or otherwise individualize the waters it references.

The combined effect of these linguistic choices makes plain that Congress never intended NPDES to reach water transfers of the type here. That makes perfect sense given that, "[t]hroughout its consideration of the [Clean Water] Act, Congress' focus was on traditional industrial and municipal wastes." *Gorsuch,* 693 F.2d at 175.

b. Petitioners' alternative, "distinct waters" reading misses the mark. Again, the United States Brief in *Miccosukee* explained that the "distinct waters" theory does not provide an alternative "reasonable" construction:

> Section 502(12) [the definition of a discharge of pollutants] *cannot reasonably be understood* to include an activity that merely transports navigable waters from one location . . . to another location. Such an activity can conceivably lead to changes in water quality, but it does not, within the normal meaning of the relevant terms, constitute an "addition" of any pollutant to "the waters of the United States."

Brief of the United States in *Miccosukee* at *16 (emphasis supplied).

Critically, the Eleventh Circuit conceded Petitioners' reading alters and embellishes upon the CWA's plain text: Petitioners' "reading effectively asks [the court] to add a fourth 'any' to the statute." *Friends* Pet. App. at 28a. What Petitioners proffer this Court is not a plain reading of the text. They provide instead what amounts to alternative language that Congress could have adopted had water transfers been an intended target. As the "distinct waters" argument makes clear, if Congress wanted to extend NPDES to water transfers, "it could easily have chosen suitable language, *e.g.*, "all pollution released through a point source." *Gorsuch*, 693 F.2d at 176. But, the NPDES system was limited to "addition" to the water from the "outside world." *Id.* at 175. It is well established that statutory terms used with prepositions, as with "addition . . . to navigable waters" here, convey a narrower concept than when used alone. *S.D. Warren*, 547 U.S. at 375. The fundamental mistake of the "distinct waters" theory is to ignore meaningful prepositional language out of a desire to proscribe all "additions" to "any" water.

The Eleventh Circuit, nonetheless, found the statutory language "ambiguous" because it believed the definition "addition . . . to navigable waters" can reasonably be read to refer to waters in the individual sense or to waters as a unitary whole. *Friends* Pet. App. at 26a. That contention was based upon the ordinary usage of the isolated term "waters." Respondents do not disagree that term can collectively refer to several different bodies of water or to any one

body of water. *Id.* But, by isolation of the term "waters" the Court created "ambiguity" that does not exist when the term is read in context of the entire prepositional phrase.

The parties' dispute is not over the undeniable divisibility and distinctiveness of the many "navigable waters." It is over what it means to "add" something "to" them. Quite simply, did Congress call for an addition "to the waters" or "to any distinct waters"? The moniker "unitary waters" merely characterizes an understanding that the former and not the latter was plainly intended. The fact that the "waters" could have been referred to distinctly is implied and irrelevant. The "unitary waters" approach acknowledges that Congress plainly and unambiguously referenced them as an aggregate whole for NPDES purposes. Unfortunately, in support of its proclivity for agency deference, the Department of Justice recently adopted the linguistic fallacy of isolating a single term from its context, which became its basis to retreat from the plain language interpretation the United States advanced in *Miccosukee*. Response of the United States to Petitions for Rehearing En Banc at 12. The United States has now abandoned the position it had defended in this case and every other case on the issue in which EPA participated.

For the same reason, the "unitary waters" approach is not undermined by *Rapanos* and the irrelevant *fact* that the "navigable waters" comprise many distinct water features. *See Rapanos v. United States*, 547 U.S. 715 (2006). In *Rapanos*, the Court was

confronted with the meaning and scope of the isolated terms "navigable waters," which is not confronted here. The waters involved in this case are all admittedly navigable.

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At bottom, the critical linguistic analysis called for in *S.D. Warren* reveals a singularly plain reading of the relevant definitions. The "distinct waters" approach does not provide a reasonable alternative reading sufficient to render the CWA ambiguous as to the applicability of NPDES to water transfers.

2. Consistency of Purpose and Structure.

Lacking a cogent plain meaning alternative to "unitary waters," advocates of the "distinct waters" theory resort to unpersuasive contextual arguments. Uniformly, they claim that the failure to impose NPDES upon water transfers runs contrary to the CWA's overarching goal of restoring the Nations' waters. 33 U.S.C. §1251(a). That argument fails because 1) the sweeping goals of a comprehensive, multifaceted regulatory scheme speaks little about the intended scope of any particular constituent program; and 2) the argument falsely insinuates that the failure to impose NPDES upon water transfers allows noxious discharges to proceed with impunity outside the CWA as a whole.

The narrow question posed by this case cannot be resolved merely by reference to a general goal. *United States v. Plaza Health Lab., Inc.*, 3 F.3d 643, 647 (2d

Cir. 1993) (citing *Gorsuch*, 693 F.2d 156, 178 (D.C. Cir. 1982) ("it is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal")). "Caution is always advisable in relying upon a general declaration of purpose to alter the apparent meaning of a specific provision." *Id.* It frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law. *Norfolk So. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007). In fact, Congress' avowed purpose to minimize pollution was not unequivocal, as the CWA's specific provisions are the result of careful balancing of countervailing policies. *See infra*, p. 25, Part I(B)(1)(b). The CWA's grand goal provides no guidance as to how Congress resolved this balancing act. In addition to that general caution, there are more specific indications that Congress did not want to interfere any more than necessary with state water management. *See* 33 U.S.C. §1251(b) & (g). The CWA's overall purpose does not tell us anything about how it is to be achieved or the role of each individual program or provision. To say the least, §1251(a) does not require courts to construe the term "discharge of pollutants" expansively in a way that is contrary to its plain defining language and competing federalism goals.

Fair consideration of the Act as a whole also dispels the concern expressed by the Court in *Miccosukee* that "several NPDES provisions" reflect an intent to protect individual waters that "might be

read to suggest a view contrary to the unitary waters approach." 541 U.S. at 107. The CWA created a multifaceted, comprehensive regulatory scheme that uses a variety of controls to reach its goals, not only NPDES. When limiting federal NPDES jurisdiction, Congress by no means left any non-point [non-NPDES] sources,[9] including water transfers, unaddressed or individual waters unprotected.

To the contrary, the CWA declares: [T]he national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of [the CWA] to be met through the control of both point and nonpoint sources of pollution. 33 U.S.C. §1251(a)(7). More specifically, the CWA stated "the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State." 33 U.S.C. §1251(a)(5).

The Water Transfers Rule makes clear that limiting NPDES does nothing more than leave the control of water transfers to non-NPDES authorities. Water Transfers Rule at 33699 col. 2. In short, while the unitary approach allows water transfers *without NPDES*, it does not remotely propose they can or should be conducted freely, outside the CWA as a whole or with impunity.

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[9] Non-point source pollution is defined by exclusion, it includes all water quality problems not subject to §402, 33 U.S.C. §1342. *Gorsuch*, 693 F.2d at 166.

Indeed, the district court in this case noted the immense, ongoing federal and state effort to address concerns with the entire Everglades ecosystem, including the subject transfers. To that end, the court cataloged the considerable regulatory framework within which the subject pumps operate and that is guiding restoration and protection of the effected water bodies. *Friends* Pet. App. at 103a (District Court Findings Part H). Pumping has been greatly reduced and only occurs today to prevent catastrophic flooding or to protect emergency water supplies during extreme drought. *Id.* at 88a & 108a. Petitioners even conceded below that the pollutants at issue could be addressed in a number of alternative ways.

Petitioners' additional claims, that the "unitary waters" approach undermines other CWA programs equally miss the mark. For example, CWA Section 404, the U.S. Army Corps of Engineers Dredge and Fill Permitting, is a separate and independent program. *United States v. Sinclair Oil, Co.*, 767 F.Supp. 200, 201 n.1 (D. Mont. 1990). As the Water Transfers Rule explains, Sec. 404 is unaffected by excluding water transfers from NPDES. Water Transfers Rule at 33703 col. 3. As well, CWA Section 303, the Total Maximum Daily Load program, does not conflict, but rather supplements NPDES to ensure individual water bodies are protected from other sources of pollution, like water transfers, through a comprehensive watershed planning process. 33 U.S.C. §1313(d) & (e) (requiring States to identify and provide for the protection and restoration of any water body NPDES' effluent limitations do not protect).

Both the Solicitor General, in *Miccosukee*, and EPA in its preamble to its Final Water Transfers Rule, further expounds in detail how the unitary waters approach is supported by, and wholly consistent with, not only the plain language, but also multiple purposes and structure of the CWA. In the end, water transfers have never been generally permitted as desired by Petitioners. The Water Transfers Rule simply codifies the thirty-eight year status quo.

B. Limiting Canons of Construction.

Even were Petitioners' broad "distinct waters" theory to be considered a "reasonable" plain meaning alternative to the "unitary waters" approach, it would be nonetheless impermissible. Two relevant interpretive approaches dictate that result. First, in this cooperative-federalism context, where Congress carefully balanced federal-state interests, "ambiguity" – the absence of a clear manifestation of Congressional intent – requires the court to check Executive powers by adopting the narrower reading. Second, because the CWA is a criminal statute, lenity requires the more limited construction.

1. The "Distinct Waters" Approach Is Not Permissible Under The Tenth Amendment.

To enforce protections of the Tenth Amendment, the Court has enunciated a clear statement rule providing that "[i]f Congress intends to alter the

'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). To that end, Congress must make a clear statement before courts will find that it has interfered with traditional state authorities because "States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* at 461. This fundamental interpretive rule dictates that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (a federal statute does not supersede "the historic police powers of the States . . . unless that was the clear and manifest purpose of Congress"). The courts have a "particular duty to ensure that the federal-state balance is not destroyed" with respect to "traditional concern[s] of the States." *See United States v. Lopez*, 514 U.S. 549, 580, 581 (1995) (Kennedy, J., concurring).

a. Traditional State Water Management.

The Respondents' responsibility for managing water resources is constitutional. Fla. Const. art. II §7. Its police powers to manage waters for public health, safety and welfare are well established and codified. Fla. Stat. §373.016(3)(j); *see Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908).

Comprehensive water management is a State priority. Fla. Stat. §373.016. States' traditional interests in water management are at their peak where the control of pollution in urban and agricultural basins – as in this case – implicates both water and land use planning. 33 U.S.C. §1251(b). Historically, land uses have been widely regulated by state, not federal authorities. The district court found the Respondent South Florida Water Management District entitled to Eleventh Amendment protections precisely because its water transfers constitute the exercise of the State's traditional and primary power over both land and water resources. *Friends* Pet. App. 181a ("The Florida Legislature has recognized that the management and protection of water resources is of critical importance to the *State*." (emphasis in original)). These functions go to the heart of the rights protected as well by the CWA's cooperative federalism and the Tenth Amendment to the United States Constitution.

b. CWA's Cooperative Federalism.

The Clean Water Act follows a cooperative federalism model that envisions a close regulatory partnership between the state and federal governments to restore and maintain the Nation's waters. *Arkansas v. Oklahoma Envtl. Prot. Agency*, 503 U.S. 91, 101 (1992); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 489 (1987). In creating this scheme, Congress struck a careful balance among competing policies and interests. *Id.* at 499. To that end, the CWA established distinct roles for the federal and state governments to

achieve their goals. *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 704 (1994).

The CWA relies heavily upon the states to maintain primary responsibility to prevent, reduce and eliminate pollution, to plan for the development and use of land and water resources and to consult with the Environmental Protection Agency. 33 U.S.C. §§1251(b) & (g), 1313(d) & (e) & 1329. Congress did not want to interfere any more than necessary with state water management. 33 U.S.C. §1251(g); *Gorsuch*, 693 F.2d at 178. Federal agencies are in turn directed to "co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources." 33 U.S.C. §1251(g). Thus, the CWA's cooperative federalism scheme was predicated upon the value of local input and experimentation. The issue is not whether water transfers escape regulation, but by what controls Congress intended them to be addressed.

> In 1972, the Congress made a clear and precise distinction between point sources, which would be subject to direct Federal [NPDES] regulation, and nonpoint sources, control of which was specifically reserved to the State and local governments through [non-NPDES] process * * * judging that these matters were appropriately left to the level of government closest to the sources of the problem.

Pub. L. 95-217, Clean Water Act of 1977, S. Rep. No. 95-370 (July 28, 1977), 1977 WL 16152 at *8-9.

As reflected in the comments of Senator Muskie, the primary sponsor of the legislation in the Senate, programs developed to deal with nonpoint sources "would involve land use and other controls of that kind." Senate Debate on S. 2770 (1972) Leg. Hist. at 1314. Thus, Congress fine-tuned its programs "in order to use them in separate places and to separate ends," leaving many sources of pollution to non-NPDES programs. *S.D. Warren*, 547 U.S. at 383. The NPDES was not designed to address all "pollution" caused by all "discharges," but was limited to the "discharge of pollution." *Id.* In the end, Congress explicitly chose not to federalize all water pollution control. *Gorsuch*, 693 F.2d at 178.

By leaving diversion projects and their navigable-water discharges to non-NPDES controls, including land use planning, Congress preserved the primacy of the States' role in managing water and land resources through programs that address both quantity and quality. This policy reduces "federal/state friction" by allowing States to "continue to exercise the primary responsibility in both of these areas and thus provide a balanced management control system." *Gorsuch*, 693 F.2d at 179 (citing H.R. Rep. No. 92-911 at 96 (1972)). That friction is at the heart of the Tenth Amendment. Approaching the water quality problems involved in the management of navigable waters through comprehensive, non-NPDES programs avoids such friction and furthers the CWA's cumulative policies. National Pollutant Discharge Elimination

System (NPDES) Water Transfers Proposed Rule, 71 Fed. Reg. 32887 (June 7, 2006).

Courts have noted that legislative history bolsters the view that "[t]he division of pollution control . . . was not just a device for separating out pollution sources amenable to NPDES. . . . Rather, Congress viewed [non-NPDES] state pollution control programs. . . . as in part an 'experiment' in the effectiveness of state regulation." *Gorsuch* at 176. Congress acknowledged that:

> [Non-point-source/non-NPDES programs] may not be adequate. It may be that the States will be reluctant to develop [adequate] control measures . . . and it may be that some time in the future a Federal presence can be justified and afforded. But for the moment, it is both necessary and appropriate to make a distinction as to the kinds of activities that are to be regulated by the Federal Government and the kinds of activities which are to be subject to some measure of local control.

Pub. L. 95-217, Clean Water Act of 1977, S. Rep. No. 95-370 (July 28, 1977), 1977 WL 16152 at *10.

c. Clear Statement Rule And *Chevron*.

Also absent from the CWA is any basis to believe Congress intended in 1972 to delegate to EPA the discretion to determine at what "time in the future a Federal presence can be justified and afforded" and therefore to shift its authority over water transfers.

Discretion to expand jurisdiction over water transfers is not something that Congress manifested any intent to grant EPA. The CWA authorizes EPA's Administrator to "prescribe such regulations as are necessary to carry out his functions under [the CWA]." 33 U.S.C. §1361(a). EPA's authority is not so broad as it is supporting now. It would be anomalous for Congress to have so painstakingly delineated federal state roles – to preserve State authority and minimize federal-state friction – and by implication give the EPA authority to "readjust" those roles. *See Gonzales v. Oregon*, 546 U.S. 243, 259-260 (2006) (implicit authority to adopt an expansive meaning "would transform the carefully described limits on [executive] authority . . . into mere suggestions."). Any inadvertent lack of clarity how and when water transfers are to be federally regulated is not the type of interstitial gap the Executive Department should be authorized by the court's to fill for themselves. The consequences of shifting federal NPDES over State facilities are far too serious to pretend that Congress intended EPA to make the call.

* * *

The need for a clear statement extending federal powers is heightened in this case, where Congress made explicit its policy to preserve the State's primary responsibilities over water and land resources. *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs,* 531 U.S. 159, 174 (2001) ("*SWANCC*"). In *SWANCC*, the Court applied the

Clear Statement Rule to the CWA, noting that Congress chose to preserve States' rights over land and water resource under §101(b) & (g), rather than "expressing a desire to readjust the federal-state balance" by extending federal jurisdiction. *Id.* Thus, in the cooperative federalism context of the CWA, not only is there a glaring absence of *any*, much less a clear, manifestation of Congressional intent for NPDES to reach water transfers, the CWA contains express limitations designed to avoid friction caused by federal intrusions into the traditional state domain.

Even if the "distinct waters" approach were accepted as a reasonable alternative reading – a concession that inherenty admits the requisite clear statement is lacking – its adoption would plainly shift the federal-state balance. It would also, by implication, grant EPA discretion to extend its own jurisdiction over the States at any time. For these reasons, "distinct waters" is not a "permissible" construction and, therefore, deference was out of place. Cooperative federalism schemes in the nature of the CWA should not be left to administrative fiat, but changed only when Congress deems it necessary.

There can be no denying that the burdens of federal Clean Water Act permitting are not light. *Rapanos*, 547 U.S. at 721 (The burden of federal regulation [under §404] is not trivial); *SWANCC*, 531 U.S. at 161 (2001) ("Permitting the United States government to claim federal jurisdiction" over State water transfers "would result in a significant

impingement of the States' traditional and primary power over land and water use"). For example, the remedies that the Petitioners sought below, include a slew of interim operational restrictions pending the issuance of a permit (*Friends* Pet. App. 47a-48a) and joinder of the State's permitting agency so that the federal court can marshal that State process. *Id.* at 50a. The lower court concedes that these remedies will result in a "somewhat lengthy process . . . further evidentiary hearings, which would require . . . additional discovery. . . . to resolve highly technical arguments." *Id.* at 49a. Indeed, the court conceded that "because EPA does not currently issue permits for water transfers[.] . . . it is unclear what a NPDES permit would ultimately look like (whether it would require treatment of the water, require pumping to cease, contain a pumping schedule, etc. . . .)." *Id.* at 124a. Critically, the court observed NPDES will "provide another layer of review, a Federal review" which it speculated "may do nothing more than provide a more effective mechanism for ensuring [the District's] compliance with its current obligations." *Id.* at 124a, 126a. Such coercion of the State – the shifting of decision making away from the local level to the federal agencies and courts – along with the practical problems of transferring responsibility for pollutant treatment from upstream sources to public water managers, offends core Tenth Amendment values and undercuts the CWA's cooperative federalism scheme.

2. The CWA's Severe Criminal Penalties Require A Narrow Construction Under Principles of Lenity.

Further constraining the court from Petitioners' expansive "distinct waters" approach is the familiar principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). The CWA is enforceable through criminal as well as civil penalties. Violations carry fines up to $100,000 per day and six years' imprisonment. 33 U.S.C. §1319(c)(2). Even a negligent violation can bring heavy fines and two years in prison. §1319(c)(1). Under Petitioners interpretation, anyone managing navigable waters so as to change their natural flow and divert water into another "distinct water body" commits a criminal offense. Criminal statutes are subject to a rule of strict construction and the rule of lenity, which require resolving doubts about a statute's meaning against the government. *Crandon v. United States*, 494 U.S. 152, 158 (1990). These rules apply in civil cases to statutory provisions, like Section 402, that have both criminal and civil consequences. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 518 n.10 (1992) (plurality) (applying the rule of lenity to interpret a "tax statute [with] criminal applications"; the rule is one "of statutory construction[,] * * * not a rule of administration calling for courts to refrain in criminal cases from applying statutory language that

would have been held to apply if challenged in civil litigation"). Because the court found no "unambiguously correct" interpretation of the CWA (*United States v. Granderson*, 511 U.S. 39, 54 (1994)), and because an expansive interpretation exposes Petitioner and countless other public water managers to criminal sanctions, the rules of lenity and strict construction require it be firmly rejected. In this context, any "ambiguity" in the scope of NPDES that survives a principled construction of the Act needed to have been resolved narrowly.

* * *

Properly considered, these established canons of construction reveal a singular "permissible" interpretation of the terms that determine the intended scope of NPDES. Deference and the potential criminalization it brings with it have no place here.

II. THE NARROW LEGAL QUESTION PRESENTED SHOULD BE REVIEWED ON CERTIORARI, NOT LEFT TO FURTHER LITIGATION AND CONTENTIOUS RULEMAKING.

When a court fails to properly interpret a cooperative federalism statute, the burden of the error falls upon the States and the public that must confront it. The Eleventh Circuit's decision exacerbates burdens that are immediate, real and undue, regardless of whether EPA makes good on its promise to reconsider the rule. Thus, Respondents are not seeking an

advisory opinion about speculative future rights or events, but seeking relief from tangible harms presently inflicted by the Eleventh Circuit's errant decision.

A. The Eleventh Circuit and EPA Have Exacerbated Nationwide Disarray and Divisiveness Over The Federal Question Presented.

The Water Transfers Rule formalized the interpretation EPA formed contemporaneously with the passage of the CWA. *Gorsuch*, 693 F.2d at 167.[10] Early on, EPA established and strongly defended its policy not to impose NPDES upon water transfer facilities. *Id.*; *Consumers Power*, 862 F.2d 580. The District of Columbia and Sixth Circuits deferred to EPA's policy expressly acknowledging the CWA's cooperative federalism principles at a time when consistency and

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[10] The Eleventh Circuit and others accepting the "distinct waters" theory as "reasonable" have taken pains to distinguish *Gorsuch* and *Consumers Power* based upon misperceptions that they only involved movements of waters within the same body of water. Those cases, however, do not rely upon any such "assumption of sameness." To the contrary, they both clearly and definitively articulate that NPDES is not triggered by moving polluted water from one "body of water" to another. *Gorsuch* in fact did not even involve a particular facility but rather was a challenge to EPA's nationwide policy not to impose NPDES on tens of thousands of dams of all sorts under the "unitary waters" interpretation, which includes the dams, reservoirs and tunnels ultimately found liable in *Catskill*. The attempted distinction is fallacious.

contemporaneous construction mattered. The Nation's water managers were reassured that the law was clarified and well established.

By 1996, things began to change. The First Circuit invented what became the "distinct waters" test when it rejected the unitary waters approach as being without "basis in law or fact" and "irrational." *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996).[11] In 2002, the Second Circuit cast off the "unitary waters" approach, finding EPA's then proposed water transfers rule "simply overlook [the CWA's] plain language." *Catskill II*, 451 F.3d at 84. The trial courts in *Miccosukee* and this matter followed in adopting Petitioners' "distinct waters" approach. *Miccosukee Tribe of Indians v. S. Fla. Water Mgmt. Dist.*, No. 98-6056, 1999 WL 33494862 (S.D. Fla. Sept. 30, 1999). While the federal government correctly points out that none of these decisions applied *Chevron*, the courts' hostility toward the linguistic and cooperative federalism underpinnings of the "unitary waters" view is palpable and disturbing.

The divisiveness and animus that developed over the course of these cases is equally disquieting. Numerous national amicus on both sides in *Miccosukee* and at all stages of this case attest that the Nation has become sharply and increasingly divided.

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[11] Notably, in *Dubois*, the Forest Service invoked a "unitary waters" argument to avoid permitting of a commercial facility that would not be excluded from NPDES under EPA's position. EPA was not involved.

State Attorneys General have split along regional lines depending in part upon the importance of water transfers to their regions (e.g. transfers are plainly more vital to the arid west than smaller northeastern states). Hundreds of comments to the proposed Water Transfers Rule detail this burgeoning rift. *See* National Pollutant Discharge Elimination System (NPDES) Water Transfers Proposed Rule Submissions at www.regulations.gov under Docket No. EPA-HQ-OW-2006-0141.

Matters worsened when past and present EPA officials disagreed whether the agency has been consistent over time. Amicus briefs from former EPA officials were filed with the Court in *Miccosukee* and with the Eleventh Circuit in this case, to refute assertions by the United States that EPA's position has been longstanding and consistent.[12] The Water Transfers Rule expressly refutes those claims. *Cf.* Brief of Former EPA Administrators in *Miccosukee,* No. 02-262, 2003 WL 22793539 (U.S. Nov. 14, 2003) and Water Transfers Rule at 33701 col. 2.

Today, those former EPA officials have rejoined the administration, which has since declared EPA's intent to "reconsider the Rule." The current administration is taking advantage of developments in *Chevron* jurisprudence that make "inconsistency" of an agency's position no longer a basis for declining

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[12] Tellingly, not one example of permitting a public water transfer facility accompanied the claim that EPA has not been consistent.

deference. *Nat'l Cable & Telecomm. Assoc. v. Brand X Internet Services*, 545 U.S. 967, 981 (2005); *Barnhart v. Walton*, 535 U.S. 212, 226 (2002) (particular deference to "longstanding" positions is an "anachronism – a relic of the pre-*Chevron* days"). Apparently, EPA now views itself free to extend its own jurisdiction well beyond express limits that the Executive Department has repeatedly and for decades acknowledged were intended by Congress to protect the States. The problem under that paradigm is that the Rule, and thus the law, is up for grabs with each change of administration.

After decades of litigation and years of rulemaking these parties, water managers nationwide and those who depend upon them are left with greater regulatory uncertainty than ever. The Eleventh Circuit's errant deference-based rationale has further muddled an already confused and contentious regulatory environment.

B. The Resulting Regulatory Uncertainty Is Stymieing Water Managers.

The nation's water managers must plan massive, multi-billion dollar water resource and restoration projects over extended development and implementation periods, often decades out. Since the CWA's enactment thirty-eight years ago, the nation's infrastructure has been planned, developed and modified to address water quality issues under non-NPDES authorities in cooperation with federal agencies. *See* 33 U.S.C. §1251(a)(7), (b) & (g).

These Respondents in particular are in the midst of the world's largest environmental project – restoration of the Everglades ecosystem – which is expected to take decades to finish. Three of those decades into it, the project continues to face significant hurdles. GAO Report to the Committee on Transportation and Infrastructure, House of Representatives, *South Florida Ecosystem: Restoration is Moving Forward but is Facing Delays, Implementation Challenges and Rising Costs* GAO-07-520 (2007). Nearly all projects comprising the federal-state partnered Comprehensive Everglades Restoration Plan ("CERP") are behind the original schedule. National Research Council, *Progress Toward Restoring the Everglades: The Third Biennial Review*, at 1 (2010) (Prepublication Copy) ("National Research Council Review").

These delays result in large part from challenges related to water quality and quantity – the heart of the Petitioners concern with water transfers – that highlight the difficulty of simultaneously achieving restoration goals for all ecosystem components in all portions of the Everglades. *Id.* Achieving water quality goals throughout the South Florida Ecosystem . . . will be enormously costly and will take decades to achieve. *Id.* Petitioners' motivations "belies the inherent complexity of the overarching goal" of the CERP. *Id.* at 126. Extensive multibillion dollar programs and plans are being developed within the framework of the Clean Water Act's non-NPDES authorities, particularly the §303(d) & (e) TMDL and Continued Planning Process, and a judicial consent

decree. *Id.* at 127. Still, there remains some "optimism that if restoration progress continues, substantial ecological benefits will accrue to the ecosystem, even if the effort does not achieve all the restoration goals originally envisioned by the CERP. *Id.* at 2.

The specter of substituting NPDES for CERP's system wide planning effort impedes the planning process for no benefit. *See* Brief of the United States in *Miccosukee v. S. Fla. Water Mgmt. Dist.*, No. 02-626, 2003 WL 22137034 at *14. The Solicitor General explained the "mistaken imposition of NPDES permitting requirements . . . is unlikely to provide any substantial environmental benefits. Rather, it would likely misdirect governmental resources and potentially hinder the Everglades restoration process." Present plans call for developing the most cost-effective mix of "all possible options" for addressing water quality, "including novel treatment approaches, enhanced BMPs,[13] land purchases, and regulatory changes." National Research Council Review at 159. The planning of massive restoration projects fundamentally changes once it is contemplated that the strictures of NPDES might substitute for the better watershed-based planning approach. Billions of dollars are being spent to develop and implement a cost-effective suite of remedies that balances quantity and quality needs throughout the region. NPDES

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[13] BMP means Best Management Practices for land stewardship, that are intended to control land uses that are a source of pollutants entering the navigable waters.

would up-end that effort. Uncertainty of what regulatory scheme the future holds defeats it.

* * *

The Eleventh Circuit's errant decision inevitably perpetuates the decade long cycle of litigation and contentious rulemaking water managers have been enduring. Only this Court, in its critically important role as interpreter of federal laws, can break the cycle. Respondents respectfully suggest the Court should provide the States with the respect called for by the cooperative federalism policies of the CWA, give clarity to the regulatory framework within which they must continue to operate and adhere to important principles of the Tenth Amendment and lenity.

CONCLUSION

Review on certiorari should be granted and the question presented restated as set forth by Respondents South Florida Water Management District and Carol Wehle, as Executive Director.

Respectfully submitted,

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ADDENDUM

Pertinent Provisions of the Clean Water Act

Section 101, 33 U.S.C. § 1251. Congressional declaration of goals and policy

(a) **Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective.** The objective of this Act [33 USCS §§ 1251 et seq.] is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act [33 USCS §§ 1251 et seq.] – (1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

* * *

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

* * *

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act [33 USCS §§ 1251 et seq.] to be met through the control of both point and nonpoint sources of pollution.

(b) **Congressional recognition, preservation, and protection of primary responsibilities and rights of States.** It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources,. . . . It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

* * *

(g) **Authority of States over water.** It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated, or otherwise impaired by this Act [33 USCS §§ 1251 et seq.]. It is the further policy of Congress that nothing in this Act [33 USCS §§ 1251 et seq.] shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

* * *

Section 303, 33 U.S.C. § 1313. Water quality standards and implementation plans

(d) **Identification of areas with insufficient controls; maximum daily loads; certain effluvient limitations revision.** (1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B), [33 USCS § 1311 (b)(1)(A), (B)] are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

* * *

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculations. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonable variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

* * *

(e) **Continuing planning process.** (1) Each State shall have a continuing planning process approved

under paragraph (2) of this subsection which is consistent with this Act [33 USCS §§ 1251 et seq.]

* * *

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 301(b)(1), section 301(b)(2), section 306, and section 307 [33 USCS §§ 1311(b)(1), (2), 1316, 1317], and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section:

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 208 [33 USCS § 1288], and applicable basin plans under section 209 of this Act [33 USCS § 1289];

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

* * *

Section 309, 33 U.S.C. § 1319. Enforcement

(c) Criminal Penalties

(1) Negligent violation.

Any person who –

(A) negligently violates section 1311

* * *

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

* * *

(2) Knowing violations

Any person who –

(A) knowingly violates section 1311

* * *

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by fine of not more

than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

* * *

Section 319, 33 U.S.C. § 1329. Nonpoint source management programs

(a) **State assessment reports.** (1) Contents. The Governor of each State shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval, a report which –

(A) identifies those navigable waters within the State which, without additional action to control nonpoint sources of pollution, cannot reasonably be expected to attain or maintain applicable water quality standards or the goals and requirements of this Act [33 USCS §§ 1251 et seq.];

(B) identifies those categories and subcategories of nonpoint sources or, where appropriate, particular nonpoint sources which had significant pollution to each portion of the navigable waters identified under subparagraph (A) in amounts which contribute to such portion not meeting such water quality standards or such goals and requirements;

(C) describes the process, including intergovernmental coordination and public participation, for identifying best management practices and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint

sources identified under 13a subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source; and

(D) identifies and describes State and local programs for controlling pollution added from nonpoint sources to, and improving the quality of, each such portion of the navigable waters, including but not limited to those programs which are receiving Federal assistance under subsection (h) and (i).

* * *

(b) **State management programs.** (1) In general. The Governor of each State, for that State or in combination with adjacent States, shall, after notice and opportunity for public comment, prepare and submit to the Administrator for approval a management program which such State proposes to implement in the first four fiscal years beginning after the date of submission of such management program for controlling pollution added from nonpoint sources to the navigable waters within the State and improving the quality of such waters.

(2) Specific contents. Each management program proposed for implementation under this subsection shall include each of the following:

(A) An identification of the best management practices and measures which will be undertaken to reduce pollutant loadings resulting from each category, subcategory, or particular nonpoint source designated

under paragraph (1)(B), taking into account the impact of the practice on ground water quality.

(B) An identification of programs (including, as appropriate, nonregulatory or regulatory programs for 14a enforcement, technical assistance, financial assistance, education, training, technology transfer, and demonstration projects) to achieve implementation of the best management practices by the categories, subcategories, and particular nonpoint sources designated under subparagraph (A).

* * *

Section 402, 33 U.S.C. § 1342. National pollutant discharge elimination system

(a) **Permits for discharge of pollutants.** (1) Except as provided in sections 318 and 404 of this Act [33 USCS §§ 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a) [33 USCS § 1311(a)], upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 USCS §§ 1311, 1312, 1316, 1317, 1318, 1343],

* * *

***Section 501, 33 U.S.C.* § 1361. Administration**

(a) **Authority of Administrator to prescribe regulations.** The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter [33 USCS §§ 1251 et seq.].

* * *

Section 502, 33 U.S.C. § 1362. Definitions

Except as otherwise specifically provided, when used in this Act [33 USCS §§ 1251 et seq.]:

* * *

(7) The term "navigable waters" means the waters of the United States, including territorial seas.

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point sources . . .

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Nos. 10-196, 10-252

In the Supreme Court of the United States

FRIENDS OF THE EVERGLADES, ET AL.,
Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DIST., ET AL.,
Respondents.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DIST., ET AL.,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT UNITED STATES SUGAR CORPORATION

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QUESTION PRESENTED

The decision of the Eleventh Circuit raises questions about the meaning of a major federal environmental statute, the Clean Water Act, that warrant this Court's review because they have enormous practical importance for water managers and users throughout the Nation and because there is confusion among the courts of appeals in the wake of this Court's ruling in *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95 (2005).

The question this Court should address is whether the plain language and structure of the Clean Water Act mandate that no Section 402 permit is required for water transfers that move polluted waters of the United States but that introduce no new pollutants to navigable waters from the outside world.

RULE 29.6 STATEMENT

United States Sugar Corporation has no parent company, and no publicly held corporation owns 10% or more of its stock.

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Respondent United States Sugar Corporation respectfully requests that this Court grant certiorari to determine a question that it left open in *South Florida Water Management District* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 109 (2004) ("*Miccosukee*"): whether the plain language and structure of the Clean Water Act mandate that a Section 402 permit is not required for water transfers that move pollution within the waters of the United States but that introduce no new pollutants to navigable waters from the outside world. Although the Eleventh Circuit held that no permit is required in this case, it reached that conclusion not by reading the plain language of the Clean Water Act but by applying *Chevron* deference to a rule that the United States has now said it is revisiting. The court's application of *Chevron* to an issue properly resolved by the application of ordinary principles of statutory interpretation grants EPA discretion that Congress did not intend it to have. It creates intolerable uncertainty for water managers and users that must plan out projects many years in advance. And the varied approaches taken by other courts of appeals add to the confusion. Petitioners have nothing else right about this case, but they are correct that this Court's review of the Eleventh Circuit's ruling is warranted.

STATEMENT

1. The Clean Water Act ("CWA") balances federal and state powers, forming "a partnership" "animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) (quoting CWA § 101(a), 33 U.S.C. § 1251(a)). Congress's express intent in the CWA is

"to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources." CWA § 101(b), 33 U.S.C. § 1251(b). It is also "the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act. CWA § 101(g), 33 U.S.C. § 1251(g). To achieve the goals of restoration and maintenance of the Nation's waters while also preserving the States' primacy in water quality protection and land and water resource management, the Act divides regulatory authority between the State and Federal Governments based on the source of pollutants.

Of critical importance to this case, Section 402 creates a permitting system for "point sources" that add pollutants to United States waters. Specifically, Section 402 requires a National Pollution Discharge Elimination System ("NPDES") permit for the "discharge of any pollutant." 33 U.S.C. § 1342(a); see also CWA § 301(a), 33 U.S.C. § 1311(a). The Act defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. § 1362(12). "Navigable waters" in turn is defined as "the waters of the United States." CWA § 502(7), 33 U.S.C. § 1362(7). The Act leaves "addition" undefined.

Beyond Section 402 and the separate Section 404 permit scheme for the addition of dredge and fill material to navigable waters (33 U.S.C. § 1344), Congress largely left the task of addressing water pollution to the States, with federal guidance,

assistance, and oversight. See *The Clean Water Act Handbook* 191-220 (M. Ryan ed. 2003). States are responsible for establishing water quality standards (CWA § 303(a), 33 U.S.C. § 1313(a)) and achieving those standards by developing, among other things, programs to manage nonpoint sources of water pollution, such as runoff. CWA §§ 303(d), 319, 33 U.S.C. §§ 1[illegible]d), 1329. In particular, Congress expressly contemplated that "pollution resulting from * * * changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of * * * flow diversion facilities," would be addressed under State nonpoint source programs—even though such diversions are usually point sources. CWA § 304(f)(2)(F), 33 U.S.C. § 1314(f)(2)(F) (headed "Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution"). Congress recognized that pollutants should be managed at their source, and it believed that subsequent diversions of polluted water are most sensibly addressed through State water resource planning and regulations.

2. Historically, much of south Florida was part of the Everglades wetlands. Starting in the early 1900s the State began building canals to drain the wetlands and make the land suitable for cultivation and habitation. *Miccosukee*, 541 U.S. at 99. In 1948 Congress expanded the State's efforts by establishing the Central and South Florida Flood Control Project ("CSFFC Project"). That project tasked the U.S. Army Corps of Engineers to construct a comprehensive network of levees, water storage areas, pumps, and canal improvements to improve flood protection, water conservation, and drainage. *Id.* at 100. The local sponsor and day-to-day operator of the project is

respondent South Florida Water Management District ("District").

Operating within the structure designed by Congress in the CWA, Florida has combated pollution of its waterways. The Everglades Forever Act of 1994 is a comprehensive regulatory program of "best management practices" for landowners within the Everglades Agricultural Area ("EAA")—a 630,000 acre area south of Lake Okeechobee where U.S. Sugar conducts significant agricultural activities—that is designed to control the release of pollutants before they enter navigable waters. See Fla. Stat. § 373.4592. Other Florida statutes that address the improvement of water quality, in particular through control of nonpoint sources of pollution, include the Watershed Restoration Act of 1999 (*id.* § 403.067) and the Lake Okeechobee Protection Act of 2000 (*id.* § 373.4595), both of which require watershed-based approaches and implementation of best management practices to reduce nonpoint source pollution.

The District has also acquired land to be used to enhance water management and pollution control, including closing on October 12, 2010 on the purchase of some 27,000 acres of land in the EAA immediately south of Lake Okeechobee from United States Sugar Corporation. Thus, as Congress anticipated, Florida and the District have gone to great lengths to improve the quality of the State's waters and continue to do so.

3. This case concerns the S-2, S-3, and S-4 pump stations in south Florida. Constructed as part of the CSFFC Project, those stations are operated by the District in close cooperation with the U.S. Army Corps of Engineers. The pump stations lie at the southern end of the Herbert Hoover Dike that

surrounds Lake Okeechobee and have the capacity to pump water from canals in the EAA into the lake. Friends Pet. App. 75a, 84a. When operating, the pumps transfer accumulated waters, which would otherwise flood populated areas, over a distance of fewer than 60 feet. As the district court found, the pump stations do not "subjec[t] the waters to any intervening industrial, municipal or commercial use" or "introduce anything to the water as it moves through the stations." *Id.* at 85a. They do, however, transfer pollution that is already in navigable waters. *Id.* at 87a.

Although the pumps operate "[a]t most" for "a few days per year" during extreme weather events (Friends Pet. App. 108a), they are of critical importance to life in south Florida. The pump stations were constructed after thousands of Floridians died in flood events. In the district court's words, the stations "provide flood protection for the basins, communities and agricultural areas that they serve" and are "essential to maintaining the agricultural activity in the EAA." *Id.* at 88a. The pump stations also provide "the only option for flood protection for the City of Clewiston," where U.S. Sugar is based. *Ibid.* "Failure to operate the S-2, S-3, or S-4 pump stations during severe rain events would cause flooding in communities and farmlands throughout the S-2, S-3, and S-4 basins." *Id.* at 89a.

Petitioners Friends of the Everglades, Florida Wildlife Federation, and Fishermen Against Destruction of the Environment filed these actions against the District pursuant to the citizen suit provision of the CWA, 33 U.S.C. § 1365(a). An amended complaint added the District's Executive Director, respondent Carol Wehle, as a defendant. Friends Pet.

App. 57a. Plaintiffs sought an injunction requiring defendants "to obtain [an NPDES permit] before [they] could discharge water containing pollutants into Lake Okeechobee[] by means of the S-2, S-3, and S-4 pump stations." *Id.* at 54a. Petitioner Miccosukee Tribe of Indians of Florida intervened as a plaintiff. *Id.* at 56a. Respondents United States Sugar Corporation and the United States intervened as defendants. *Id.* at 55a-56a.

4. The district court stayed this case pending this Court's resolution of *Miccosukee*. Friends Pet. App. 57a. *Miccosukee* addressed a similar controversy, between many of the same parties, over a different south Florida pump station, the S-9, that likewise moves navigable waters that contain pollution but does not add pollutants to navigable waters. The Eleventh Circuit had affirmed the district court's grant of summary judgment, holding that the District must obtain an NPDES permit to operate the S-9 pump station. This Court agreed with the District that summary judgment was erroneous because there was a genuine issue of material fact as to whether the S-9 pump station transferred water between two meaningfully distinct bodies of water. This Court vacated the Eleventh Circuit's decision and remanded. 541 U.S. at 109-112.

5. This Court in *Miccosukee* flagged, but did not resolve, an argument raised by the United States as amicus in support of the District. The United States argued to this Court that the Eleventh Circuit's ruling "should be reversed for the straightforward reason that the pumping station does not 'add' pollutants to 'the waters of the United States.'" U.S. Amicus Br., No. 02-626, at 21 (Sept. 10, 2003), available at http:tinyurl.com/253yuc. "[B]y [the Act's] ex-

press terms," the United States explained, the "pumping activity does not result in 'the discharge of any pollutant' within the meaning of the [Act]," because the S-9 station "merely transports navigable waters from one location to another" without "introduc[ing] any pollutants into the waters of the United States from the outside world." *Id.* at 2, 13, 15. Any pollutants transferred in the process are "already *in* 'the waters of the United States,'" not *added to* those waters. *Id.* at 16.

The United States' argument rested squarely on "[t]he text and structure of the Clean Water Act," which it told this Court "make clear that Congress had no intention to subject ordinary water control and distribution activities" to "the NPDES permitting regime." U.S. Amicus Br., No. 02-626, at 15. The United States stressed that the relevant provisions "cannot reasonably be understood to include an activity that merely transports navigable waters." *Id.* at 16. And it criticized as "unsound" any suggestion that Section 402 applies to water transfers between "two separate bodies of water." *Id.* at 18. Had Congress "intended that the movement of one body of navigable waters into another body of navigable waters should be treated as the addition of a pollutant to navigable waters, it would have made that extraordinary intention manifest." *Id.* at 19.

In explaining why the structure of the CWA confirmed its plain language analysis, the United States pointed to Congress's "understanding that facilities that merely convey or connect navigable waters would be regulated through means other than the NPDES permitting program." U.S. Amicus Br., No. 02-626, at 25. In particular, it observed that "regional water quality problems" are "more sensibly

addressed through water resource planning and land use regulations, which attack the problem at its source." *Id.* at 27. It observed that other "federal and state legislation" apart from the CWA "frequently" apply. *Id.* at 27-28 (citing the National Environmental Policy Act, the Comprehensive Everglades Restoration Plan, and Florida's Everglades Forever Act). Given such laws, the United States recognized that "the imposition of NPDES permitting requirements" to water transfers "is unlikely to serve any useful purpose," but instead would "misdirect governmental resources toward unnecessary or duplicative processes and potentially hinder the Everglades restoration process." *Id.* at 28.

The United States' position in *Miccosukee* did not rest on deference to the EPA. The United States never cited *Chevron* or its progeny. And the word "deference" appears just twice in its brief, in footnotes. The Government stated that two favorable circuit court decisions rested "in significant part, on deference to EPA's views," but emphasized that those decisions "also follo[w] based on a straightforward reading of the Clean Water Act's text." U.S. Amicus Br., No. 02-626, at 17 n.4. The second use concerned *Congress's* deference to *State* water laws. *Id.* at 26 n.11.

As the United States explained at oral argument in *Miccosukee*, its brief adopting the position that the plain language and structure of the Act precluded a reading that subjects water transfers to NPDES permitting "reflect[ed] a consensus of a number of agencies, not only EPA, but the Department of the Interior, the Corps of Engineers, and the Department of the Army." Tr. of Oral Arg., No. 02-626, at 28-29.

6. This Court in *Miccosukee* "decline[d] to resolve" the Government's "unitary waters" argument because it was not presented to the Eleventh Circuit or to this Court in the petition for certiorari and because a remand was in order anyway. 541 U.S. at 109. The Court mentioned a few arguments for and against the Government's reading. *Id.* at 106-109. But it left the unitary waters argument "open to the parties on remand." *Id.* at 109.

The *Miccosukee* case was stayed on remand, pending resolution of this current case between essentially the same parties that raises the very argument that this Court left open. See 559 F.3d 1191, 1197-1198 (11th Cir. 2009).

7. After the decision in *Miccosukee*, the district court in this case lifted its stay and held a bench trial. Friends Pet. App. 53a. Observing that the case "rests primarily upon the proper interpretation of a few words of the CWA," the district court ruled that an NPDES permit is required for water transfers that convey pollutants among "distinct water bodies." *Id.* at 132a-133a, 170a. The district court found the Act unambiguous in that regard and declined to defer to the EPA's then-proposed rule favoring the contrary result. *Id.* at 170a. The district court also found as a matter of fact that the S-2, S-3, and S-4 pump stations transfer water from one meaningfully distinct body of water to another, thus triggering Section 402's coverage under the district court's test. *Id.* at 174a.

The district court entered an injunction requiring the District's Executive Director to apply for an

NPDES permit. Friends Pet. App. 40a.[1] Anticipating "complications in the permitting process," the court refused to impose a deadline for issuance of the permit. *Id.* at 47a.

8. As defendants' appeal was pending before the Eleventh Circuit, the EPA published a final regulation that "clarif[ied] that water transfers are not subject to regulation under the [NPDES] permitting program." National Pollutant Discharge Elimination System (NPDES) Water Transfers Rule, 73 Fed. Reg. 33,697, 33,697, 33,699 (June 13, 2008). The preamble analyzed the Act's statutory language, structure, and legislative history, and concluded that "Congress generally did not intend to subject water transfers to the NPDES program." *Id.* at 33,701.[2]

9. The Eleventh Circuit reversed, based solely on *Chevron* deference to the EPA's final rule. The court noted that this case cleanly "turns on whether the transfer of a pollutant from one navigable body of

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[1] The district court held that the District enjoyed sovereign immunity from plaintiffs' suit and dismissed it as a party. Friends Pet. App. 50a, 52a. The District and its Executive Director nevertheless conceded that petitioners could proceed against the Executive Director under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). Friends Pet. App. 43a n.2.

[2] Several parties, including petitioners, challenged the EPA's final rule. The Judicial Panel on Multidistrict Litigation directed those challenges to the Eleventh Circuit, which consolidated the challenges under *Friends of the Everglades* v. *EPA*, No. 08-13652-C (11th Cir.). The Eleventh Circuit stayed that proceeding pending its resolution of this case. District court lawsuits challenging the rule also have been stayed. See *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *EPA*, 630 F. Supp. 2d 295 (S.D.N.Y. 2009).

water to another is a 'discharge of a pollutant' within the meaning of the [CWA]." Friends Pet. App. 3a.

The Eleventh Circuit correctly observed that defendants' reading of the CWA's text is "derived from the dictionary definition of the word 'addition'" and "holds that it is not an 'addition . . . to navigable waters' to move existing pollutants from one navigable water to another." Friends Pet. App. 11a-12a. The court claimed that this "unitary waters" interpretation had been rejected by courts to have considered it. *Id.* at 12a-13a (citing *Dubois* v. *U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996); *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 451 F.3d 77, 83 (2d Cir. 2006); *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481, 491 (2d Cir. 2001); *N. Plains Res. Council* v. *Fidelity Exploration & Dev.*, 325 F.3d 1155, 1163 (9th Cir. 2003)).

The court of appeals stated that were it simply to interpret the statute, it "might" decide against defendants. Friends Pet. App. 15a. But it determined that the EPA's final rule clarifying the statute represented an "important" "change" in the law. *Ibid.* The court held that the above-cited cases are distinguishable—none of them analyzed Section 402 under *Chevron*. *Ibid.*; *id.* at 21a-24a. The court also distinguished the cases defendants cited for support as supposedly not involving water transfers "from one body of water to a different body of water." See *id.* at 18a-21a (discussing *Nat'l Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580 (6th Cir. 1988); *Nat'l Wildlife Fed'n* v. *Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982)).

Having concluded that other Circuits' decisions are not precedent as to the EPA's clarifying rule, the

Eleventh Circuit turned to the parties' analysis of the Act. Plaintiffs argued that "'to navigable waters' refers to each individual water body" and that as a result, "the statute means 'any addition of any pollutant to *any* navigable waters,' even though those are not the words the statute uses." Friends Pet. App. 26a. The court criticized that reading, which would "add a fourth 'any' to the statute," because "we are not allowed to add or subtract words from a statute; we cannot rewrite it." *Id.* at 28a. "Congress knows how to use the term 'any navigable water[s]' when it wants to protect individual water bodies instead of navigable waters as a collective whole." *Id.* at 28a-29a (citing 33 U.S.C. §§ 407, 419, 512, 1254(a)(3), 1314(f)(2)(F)). "'The common use by Congress of 'any navigable water' or 'any navigable waters' when it intends to protect each individual water body supports the conclusion that the use of the unmodified term 'navigable waters' * * * means the waters collectively." *Id.* at 29a.

The Eleventh Circuit did not however fully embrace defendants' reading. It suggested that the Act uses "navigable waters" at one point to refer to particular bodies of water and that defendants' interpretation "tends to undermine the goals of the NPDES program." Friends Pet. App. 30a (citing CWA § 303(c)(2), 33 U.S.C. § 1313(c)(2)); *id.* at 33a. The court also envisioned a "horrible hypothetical" involving pumping "the most loathsome navigable water in the country into the most pristine one," which it said would not "comport with the broad, general goals of the [CWA]." *Id.* at 33a. Yet the court noted that it "'interpret[s] and appl[ies] statutes, not congressional purposes'" (*ibid.*), that the "provisions of legislation reflect compromises" (*id.* at 35a), and that "the NPDES program does not even address"

"[n]on-point source pollution, chiefly runoff, [which] is widely recognized as a serious water quality program." *Id.* at 34a.

The court thus concluded that the statute was ambiguous, and that EPA's rule was reasonable and must be accorded *Chevron* deference. Friends Pet. App. 36a-37a. The court closed with a hypothetical involving marbles in a bucket in order "to strip a legal question of the contentious policy interests attached to it and think about it in the abstract." *Id.* at 37a. The court suggested that it is reasonable to conclude that a transfer of two marbles from one bucket to a nearby bucket both is, and is not, an addition "of any marbles to buckets." *Ibid.*

10. Plaintiffs petitioned for rehearing en banc. Opposing those petitions, the United States adopted a position at odds with its brief in *Miccosukee*. The Government contended that Section 402 is ambiguous and that the EPA's final rule therefore must govern. The Government also claimed it could "retain, rescind, reconsider, or change the water transfers rule," and added that the "EPA in fact intends to reconsider the rule." U.S. Response to Petitions for Rehearing En Banc at 15.

The Eleventh Circuit denied plaintiffs' petitions for rehearing en banc. Friends Pet. App. 204a. Plaintiffs timely petitioned for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

Water transfer projects are often immense in size, scope, and cost. They take years to plan and complete. Such projects—whether for flood control, irrigation, urban water supply, wetland management, or other water management tasks—are critical to state and local governments and residential, com-

mercial, industrial, and agricultural users of water alike. All those interested in water transfer projects need to know whether a Clean Water Act permit is required—with the extra expense, delay, uncertainty, and opportunities for litigation that obtaining such a permit entails. See Tr. of Oral Arg., No. 99-1178, at 18, *Solid Waste Agency of N. Cook County* v. *Army Corps of Eng'rs*, 531 U.S. 159 (2001) (administrative record for relatively simple Section 404 permit application, in permitting for seven years prior to years more of litigation, exceeded 47,000 pages).

Although the Eleventh Circuit's judgment that no permit is required in this case is correct, the court's reasoning and the government's ever-changing position fail to provide the requisite clarity for water managers and users. Adding to the uncertainty, other courts of appeals have taken different approaches, with the Second Circuit suggesting that the statute unambiguously requires permitting of water transfers.

Respondent United States Sugar Corporation's sugar cane operations depend for irrigation and flood control on the heavily engineered water management system maintained by the District and U.S. Army Corps of Engineers—including the S-2, S-3, and S-4 pumps at issue here. United States Sugar Corporation takes the unusual step of urging this Court to grant certiorari to secure a uniform rule that point sources like these pumps, which merely convey navigable waters containing pollution, do not constitute an "addition" of pollutants to navigable waters subject to the permitting requirements of Section 402.

This case is the appropriate vehicle for the Court to decide this important issue, which it left for another day in *Miccosukee*. See 541 U.S. at 109

("unitary waters" argument available on remand); *id.* at 113 (Scalia, J., concurring in part) ("leaving the Government's unitary waters theory to be considered in another case"). The issue has been fully briefed by the agency, environmental group, tribal, state water manager, and business parties, as well as by amici representing all types of stakeholders. It is squarely presented by the facts, developed after a full trial. And the question has percolated in and divided the lower courts. There is no need for further delay in resolving whether CWA Section 402 applies to water transfers like the S-2, S-3, and S-4 pumps.

I. THE ELEVENTH CIRCUIT SHOULD HAVE HELD THAT THE PLAIN LANGUAGE OF THE CWA UNAMBIGUOUSLY MANDATES THAT NO SECTION 402 PERMIT IS REQUIRED FOR WATER TRANSFERS.

The EPA concluded in its 2008 rule that water transfers from one body of water to another that contain pollution do not constitute an "addition" of pollutants within the meaning of the CWA. The EPA's interpretation is the *only* possible plain language reading of the statute. The Eleventh Circuit should have upheld the EPA's interpretation under the statute's plain meaning rather than by applying *Chevron* deference. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council Inc.*, 467 U.S. 837 (1984). The court of appeals' erroneous ruling that the statute is ambiguous allows a new Administration to revisit the question whether permits are required for water transfers, as EPA is now doing. In fact, under the only proper reading of the Act, EPA has no such authority.

A. The CWA By Its Plain Language Requires A Section 402 Permit Only When There Is An "Addition" Of Pollutants.

Section 402 creates the National Pollution Discharge Elimination System as part of the EPA's regulatory authority to eliminate the release of industrial and municipal waste into the Nation's waters. 33 U.S.C. § 1342. An NPDES permit, which sets out "effluent limitations," is required for "the discharge of any pollutant." CWA § 301, 33 U.S.C. § 1311. "Discharge of a pollutant" is defined by the CWA as "any addition of any pollutant to navigable waters from any point source." CWA § 502(12), 33 U.S.C. § 1362(12). As the District of Columbia and Sixth Circuits explained:

> [I]t does not appear that Congress wanted to apply the NPDES program wherever feasible. Had it wanted to do so, it could easily have chosen suitable language, *e.g.*, "all pollution released through a point source." Instead, as we have seen, the NPDES system was limited to "addition" of "pollutants" "from" a point source.

Nat'l Wildlife Fed'n v. *Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982); see also *Nat'l Wildlife Fed'n* v. *Consumers Power Co.*, 862 F.2d 580, 586 (6th Cir. 1988).

In *Miccosukee*, this Court held that a transfer of water containing pollutants from one body of water to another could be a "point source," but left open the question of whether such a transfer constituted an "addition" to "navigable waters." It is the position of U.S. Sugar—and was the position of the United

States in *Miccosukee*—that because the Act defines "navigable waters" as "the waters of the United States" (CWA § 502(7), 33 U.S.C. § 1362(7)), a transfer of water containing pollution from one body of water to another does not constitute an "addition" of "pollutants," because the transferred pollution never leaves "the waters of the United States."

1. There is no "addition" when pollutants are merely conveyed in "navigable waters" from one body of water to another.

Statutory interpretation must begin with "the language of the statute." *Bailey* v. *United States*, 516 U.S. 137, 144 (1995). Every clause and word of the statute should be given effect. *United States* v. *Nordic Vill.*, 503 U.S. 30, 36 (1992). And the statute must be read as a whole, "since the meaning of statutory language, plain or not, depends on context." *Conroy* v. *Aniskoff*, 507 U.S. 511, 515 (1993). In "a complicated statute like the Clean Water Act," it is particularly important for the Court to give careful reading to statutory terms since "technical definitions [were] worked out with great effort in the legislative process." *S.D. Warren Co.* v. *Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 380 (2006).

There is no dispute that the pumps in this case are "point sources" or that the canals and Lake Okeechobee, between which the pumps convey water, are "navigable waters." It is also undisputed that the number, size, and quantity of pollutants is not increased by their movement through the pumps. The question squarely presented is whether conveying water containing pollution from one navigable water to another constitutes an "addition" of pollutants to "navigable waters." The answer is "no."

Without a statutory definition, the term "addition" must be construed "in accordance with its ordinary or natural meaning." *S.D. Warren*, 547 U.S. at 376. "Addition" is the "result of adding; anything added," and to "add" is to "join, annex, or unite * * * so as to bring about an increase (as in number [or] size)." *Webster's Third New International Dictionary* 24 (1993). There is no increase in the pollutants in "navigable waters" when pollutants are transferred along with water from one body to another, because the navigable waters are defined as a whole—"the waters of the United States." Nothing has been joined to the waters of the United States that was not already in those waters. Pollutants are only "joined" or "united" with "the waters of the United States" when they first enter those waters. See *Gorsuch*, 693 F.2d at 165 (holding that NPDES applies only when a point source is the site of the pollutant's initial entry to navigable waters); *Consumers Power*, 862 F.2d at 584 (same); *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 132-133 (1985) (Congress's goal for the CWA was to control pollutants "at the source").

The United States took exactly this position in its brief to this Court on the merits in *Miccosukee*. The United States there explained that "[w]hatever pollutants the waters contain are already *in* 'the waters of the United States,' when those waters pass through" pumps, which "merely conve[y]," but do not add pollutants to those waters. U.S. Amicus Br., No. 02-626, at 16 (emphasis in original).

"[D]ischarge of a pollutant" is "a phrase made narrower," this Court has recognized, "by its specific definition requiring an 'addition' of a pollutant to the water." *S.D. Warren*, 547 U.S. at 381. "[S]omething

must be added in order to implicate" the NPDES permitting requirement. *Ibid.* The pollutants in this case, and in most water transfers, are pre-existing. They were "added" by sources upstream or are naturally occurring. Because pollutants are not increased or augmented by the pumps, Section 402 does not apply here. See *Consumers Power*, 862 F.2d at 586 (a permit is not required for "those pollutants already in the water moved and transformed by the essential operation of a * * * dam"); *Appalachian Power Co.* v. *Train*, 545 F.2d 1351, 1377 (4th Cir. 1976) ("constituents occurring naturally in the waterways or occurring as a result of other industrial discharges do not constitute an addition of pollutants by a plant through which they pass").

2. "Navigable waters" must be read as a unitary whole.

In determining whether an "addition" has occurred, the crux of the parties' dispute is whether or not the "navigable waters" must be considered as a whole, meaning all of the waters of the United States. Three different readings of the statute are before the Court. If the plain language of the statute requires reading "navigable waters" as a whole, as U.S. Sugar contends and the United States argued in *Miccosukee*, then there is no addition of pollutants when pollution already in navigable waters is conveyed from one body of water to another without intervening use, because that pollution never leaves the waters of the United States.

The environmental petitioners argue, by contrast, that a plain language reading of the statute requires reading "navigable waters" in the plural, such that the phrase is made up of numerous individual bodies of water in the United States. Under

that reading, conveying pollutants from one water body to another constitutes an "addition" because the pollutants leave one navigable water and enter another.

Finally, although the United States advocated a unitary waters reading in *Miccosukee* (see 541 U.S. at 96), it now takes the position that the statute is ambiguous and that the Court should defer under *Chevron* to the EPA's reasonable interpretation.

Given the language of Section 402, "navigable waters" cannot be considered ambiguous. It can only be read as a unitary whole. First, the modifier "any" precedes every element of Section 402 *except* for "navigable waters." The statute contemplates "*any* addition of *any* pollutant to navigable waters from *any* point source." CWA § 502(12), 33 U.S.C. § 1362(12) (emphases added). Because only "navigable waters" lacks the modifier, Congress must have intended to refer to "navigable waters" in the aggregate. See *United States* v. *Gonzalez*, 520 U.S. 1, 5 (1997) ("any" means "one or some indiscriminately of whatever kind"); *62 Cases, Etc.* v. *United States*, 340 U.S. 593, 596 (1951) (key to statutory interpretation is to look at "what Congress has written" and "neither to add nor to subtract, neither to delete nor to distort").

Second, Section 402 speaks of an addition "to navigable waters," not "to navigable water." The use of the collective word *waters* indicates a clear intent to designate all U.S. waters taken together as the receiving body by which an "addition" is judged, rather than an individual body of water.

Third, the use of the definite article "the" in defining "navigable waters" as "the waters of the

United States" confirms that "navigable waters" is a conceptual whole when determining if an addition has occurred. CWA § 502(7), 33 U.S.C. § 1362(7); see *Rapanos* v. *United States*, 547 U.S. 715, 732 (2006) (emphasizing "use of the definite article ('the') and the plural number ('waters')" in construing Section 502(7)).

By contrast, Congress did use terms dividing the "navigable waters" elsewhere in the statute, making clear that it understood navigable waters as a unitary concept that could be apportioned. See CWA § 302(a), 33 U.S.C. § 1312(a) (providing for water quality based effluent limitations on point source discharges when necessary to attain "water quality in *a specific portion of the navigable waters*"); CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A) (requiring States to establish water quality standards taking into account "the designated uses of *the navigable waters involved*"); CWA § 303(d)(1)(B), 33 U.S.C. § 1313(d)(1)(B) (referring to "waters *or parts thereof*") (all emphases added). Congress would have used this same terminology regarding parts or portions of the navigable waters in Section 402 had it intended the provision to address individual water bodies so as to apply to pollutants moved from one navigable water body to another. But it did not do so.

B. Other Statutory Provisions Confirm The Unitary Waters Reading Of The CWA.

The structure of the CWA also guides its plain language interpretation, and confirms the unitary waters reading. See *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 186 (2004).

1. Congress left water flow management to the States in Section 304(f).

Section 304(f) "concerns nonpoint sources" of pollution. *Miccosukee*, 541 U.S. at 106. It is entitled "[i]dentification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution." 33 U.S.C. § 1314(f). Section 304(f) requires the EPA, working with state and federal agencies, to develop guidelines for nonpoint source pollution and "to control pollution resulting from * * * changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." *Ibid.* Thus, even though "flow diversion facilities" like the S-2, S-3, and S-4 pumps qualify as point sources, Congress intended the States to address movement of water through them in the States' nonpoint source programs. By delegating authority to address pollution carried through flow diversion facilities to the States, Section 304(f) makes clear that Section 402 was not meant to address water transfers.

2. Pollution and pollutants are different under the CWA.

Reading Section 402 to include water transfers also confuses the definition of "pollutant" with the definition of "pollution," even though the CWA clearly distinguishes between the two. "Pollutants" are tangible wastes that are discharged into navigable waters. CWA § 502(6), 33 U.S.C. § 1362(6). "Pollution" is more broadly defined as "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of waters." CWA § 502(19), 33 U.S.C. § 1362(19). Therefore pollutants

that are already in navigable waters are considered "pollution." The transfer of canal water into the lake by the S-2, S-3, and S-4 pumps involves the movement of pollution since it affects a change in water quality, but it should not be classified as the discharge of a pollutant since already-polluted natural water is merely being diverted. See *Gorsuch*, 693 F.2d at 172 (the "use of two different terms is presumed to be intentional"; "pollution" is not the same as a "pollutant"). Pollution is regulated by the States under Section 304(f), not by the EPA under Section 402.

Petitioner Friends suggests that the inclusion of "dredged spoil" in the definition of pollutant (CWA § 502(6), 33 U.S.C. § 1362(6)) demonstrates that Congress rejected the "unitary waters" reading. Friends Pet. 23. According to Friends, the "discharge" of dredged fill requires a Section 404 permit (33 U.S.C. § 1344), and dredged spoil "inherently comes from navigable water bodies," so a reading of the statute that pollutants transferred from one navigable water to another do not constitute the "discharge of a pollutant" would render the whole Section 404 program irrelevant. But Friends ignores that dredging, unlike a water transfer, requires removing the dredged fill material from the navigable waters. That there may be an addition to navigable waters if a pollutant like dredged spoil is taken out of navigable waters and then dumped back into them, rather than moved around within navigable waters, says nothing about whether water transfers involve an addition of pollutants.

3. Congress sought to retain the States' authority over water allocation and protection.

Water allocation and protection has historically been a State prerogative. Any interpretation of the Clean Water Act must recognize that Congress had a policy and objective of maintaining the States' important role in water management. *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 & n.10 (1991) (in construing a statute a court should adopt the sense of words that harmonizes their context while promoting the policy and objectives of the legislature). When the Act was passed, Congress intended that "the authority of each State to allocate quantities of water within its jurisdiction shall not be * * * impaired." CWA § 101(g), 33 U.S.C. § 1251(g). And it expressly stated "the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution." CWA § 101(b), 33 U.S.C. § 1251(b).

Only the unitary waters reading of the statute captures the policy of cooperative federalism set out by Congress when it enacted the CWA. The CWA envisions "a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) (quoting CWA § 101(a), 33 U.S.C. § 1251(a)). Being closer to the difficulties of local water management, the States were (and are) more capable of integrating waterway cleanup needs with local needs related to transporting, storing, and using water.

In light of Congress's goal to protect and preserve traditional State authority, and the express provision

of Section 304(f) discussed above, it is inconceivable that Congress meant to eliminate historic State management of local water resources for flood control and water supply purposes by reading a "discharge" to include water transfers. See *SWANCC*, 531 U.S. at 174 (rejecting expansive reading of CWA where it "would result in a significant impingement of the States' traditional and primary power over land and water use").

II. THIS COURT'S REVIEW IS NECESSARY TO END CONFUSION ON AN ISSUE OF GREAT NATIONAL IMPORTANCE.

The issue in this case affects the ability of States, municipalities, and local governments to manage the Nation's most precious resource—water—for urban use, agricultural irrigation, and flood control. Subject to tight budgetary constraints, local governments must be able to transport water in an efficient and cost-effective manner. Without a clear rule establishing that transfer of the Nations' waters from areas of plenty to areas of paucity does not require Section 402 permitting, additional costs, delays, uncertainty, and opportunities for litigation will hamper important projects, with adverse consequences for human health and safety and economic well-being.

A. Failure To Resolve This Dispute Will Delay Time-Sensitive Water Transfer Projects That Provide Critical Services Nationwide.

The pumps at issue here are a microcosm of the essential water services that local water transfer facilities provide. By moving excess water from canals into Lake Okeechobee, the S-4 pump provides

the city of Clewiston and its 7,000-plus citizens with their only means of flood protection. Friends Pet. App. 88a. In fact, on most occasions when the pumps operate, it is to dispose of floodwaters that "during severe rain events would cause flooding in communities and farmlands throughout" the area. *Id.* at 88a-89a.

Across the Nation, water transfers are critical to water resource management. In Colorado, for example, diversions from one water basin to another provide sixty percent of the State's population with some portion of their domestic water supplies. Br. Amici Curiae of the States of Colorado and New Mexico in Support of Petitioner in *Miccosukee*, No. 02-626, at 2-3 (Sept. 10, 2003) (hereinafter "Western States Br."). Over half of the State's irrigated farmland relies on such transfers. *Id.* at 3. Two mountain tunnels provide the City of Denver with 200,000 acre feet per year that support almost half of its water needs. *Id.* at 2. And 49 major water transport projects move an average of 550,000 acre feet of water throughout Colorado annually. *Ibid.* These projects, in addition to "several hundred" others in the State, would potentially require permits under the statutory interpretation advocated by petitioners. *Id.* at 2-3 & n.2.

One has only to consider the role of pumping stations in New Orleans to understand that delays in building modern facilities can have deadly consequences.[3] But the regulatory burden of Section 402

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[3] Much damage to New Orleans from Hurricane Katrina occurred due to the failure of local pumping stations. While the scope of Katrina meant the pumps could not prevent the flooding, had the pumps been operational, they could have

permitting would prevent or slow the building of necessary water pumping and transport facilities nationwide. And both the permitting process and the terms imposed in permits provide endless opportunities for litigation for project opponents.

The EPA already faces a growing backlog of permit renewals for facilities previously approved for Section 402 permitting. Under the Clean Water Act, Section 402 permits must be renewed at least every five years. As of December 2009, only 80% of major facilities and 84% of minor facilities held permits that were current.[4] Every year, thousands of facilities must go through the review process to have permits renewed. Adding new permitting requirements for water transfer projects that will face inherently local restraints related to local soils, precipitation levels, industrial and agricultural use, and topography will overwhelm an already overwhelmed agency that Congress never intended to regulate water transfers in the first place.[5]

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reduced the flooding duration, so as to "reduce economic damages, human suffering, and loss of life." *Volume VI – The Performance—Interior Drainage and Pumping*, in *Performance Evaluation of the New Orleans and Southeast Louisiana Hurricane Protection Systems: Final Report of the Interagency Performance Evaluation Task Force* V-28 (Mar. 26, 2007), available at https://ipet.wes.army.mil/; see also *U.S. Army Corps of Engineers New Orleans District, Pump Station Repairs and Stormproofing*, available at http://www.mvn.usace.army.mil/hps2/hps_pumps_storm.asp.

[4] See http://www.epa.gov/npdes/pubs/grade.pdf and http://www.epa.gov/npdes/pubs/grade_minor.pdf.

[5] The spring snow melt and intense thunderstorms of the Western States provide one example of the inherently local nature of water management. The sheer volume of water at these times, combined with the increased level of suspended

Water transfer projects can be enormous. The largest water transfer system in the country, California's State Water Project, delivers up to 4.7 million acre feet of water annually through the San Francisco Bay Delta "to provide supplemental water to twenty million Californians and 660,000 acres of irrigated farmland." Western States Br. at 4-5. These projects' scope necessarily means that numerous interests are affected. They serve environmental needs as well as those of agriculture, cities, and industry. The Bureau of Reclamation's Central Valley Project delivers nearly 7.3 million acre feet annually "to irrigate 2.6 million acres" and "for urban and wildlife uses." *Id.* at 5.

Because of their size, importance, and the varied interests competing for their services, large-scale water transfer projects require years of planning before they can be approved. Additional cost and delay from not knowing whether permitting is required will lead important projects to be canceled or altered in ways that prevent them from accomplishing the water management necessary to prevent towns from being flooded, wildlife from receiving needed flows, and crops from withering due to drought.

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solids in the water due to the rapid velocity of run-off, mean that any permit would likely require a diversion to spend millions of additional dollars to construct a facility simply to handle increased levels of *natural* pollutants occurring for only a few days each year when water diversions reach their peak. Western States Br. at 15-16. Subjecting such waters to treatment under Section 402 will be inordinately costly. One water transfer project in Colorado already diverts water at a rate four times larger than the capacity of the State's largest existing treatment plant. *Id.* at 16 n.14.

Continued uncertainty about which of the three positions advocated by the parties in this case is the correct reading of the CWA is intolerable in these circumstances. The Urban Land Institute estimates that needed water infrastructure will cost $10 to $20 billion per year over the next 20 years.[6] Booz Allen Hamilton suggests an even larger figure. It believes that the United States and Canada will need to invest $6.5 trillion in water infrastructure to meet expanding water demands over the next two decades and modernize obsolete systems. *A Glass Half Empty*, THE ECONOMIST, May 20, 2010. A warming planet's potential impacts on water supplies and continued population growth also require improvements in water efficiency (including its transfer). See Bryan Walsh, *Dying for a Drink*, TIME, Dec. 4, 2008. Governments poised to invest billions or even trillions of dollars in projects involving water transfers, as well as citizens and businesses like United States Sugar Corporation that are dependent on those projects, deserve to know what legal rules will control the permitting question.

B. Disarray In The Courts Of Appeals And The Changing Positions Of The Government Have Left The Law In A State Of Confusion.

Responding to petitions for rehearing en banc below, the Government stated that the EPA "intends to reconsider" its water transfer rule. U.S. Response to Petitions for Rehearing En Banc at 15. In some

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[6] *Urban Land Institute, Infrastructure 2010: Investment Imperative* 9 (2010), available at http://www.uli.org/sitecore/~/media/Documents/ResearchAndPublications/Reports/Infrastructure/IR2010.ashx.

circumstances an announcement that a rule is to be revisited might be cause for this Court to delay reaching the statutory question whether the existing rule is proper. But that is not the case here. Both the tribal and environmental petitioners and the water manager and business respondents contend that the CWA plainly mandates whether permitting is required for water transfers. If any of their arguments is correct, EPA lacks discretion as to the central issue addressed by the water transfer rule: whether such transfers require permits. The fact or content of any new rule is simply irrelevant to that inquiry.

In any event, this Court should not delay review simply because the Solicitor General speculates that a new rule might one day emerge. In fact, the Government's switches of position are a major cause of the uncertainty that bedevils water management, and they show the need for this Court to resolve whether EPA has the discretion the Eleventh Circuit afforded to it.

The United States took the position in this Court in *Miccosukee* that plain statutory language requires a "unitary waters" reading of the statute (541 U.S. at 96; U.S. Amicus Br., No. 02-626, at 25-26), switched to arguing that a "unitary waters" definition should be deferred to under *Chevron* at earlier stages of this case (*e.g.*, U.S. Response to Petitions for Rehearing En Banc at 11-15), and now plans to revisit the rule under that cloak of *Chevron* deference. In doing so it leaves thousands of projects essential to human health and economic well-being in permit limbo while it plays interpretive musical chairs.

Courts are no less confused. While the Eleventh Circuit's decision here was the first to consider EPA's final water transfer rule, it is certainly in consider-

able tension with decisions of the First and Second Circuits rendered earlier that rejected a unitary waters reading of the statute. *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 273 F.3d 481 (2d Cir. 2001); *Catskill Mountains Chapter of Trout Unlimited, Inc.* v. *City of New York*, 451 F.3d 77 (2d Cir. 2006); *Dubois* v. *U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996) ("[t]here is no basis in law or fact for the district court's 'singular entity' theory" that the bodies of water in question "are all part of 'a singular entity, the waters of the United States'").

In particular, the Second Circuit in its second *Catskill* decision had before it the EPA's 2005 interpretive memorandum on which the proposed water transfer rule was based. Nevertheless, "in honoring the [CWA's] text" the court thought the statute mandated that a permit be obtained. 451 F.3d at 84-85 ("In the end, while the City contends that nothing in the text of the CWA supports a permit requirement for inter-basis transfers of pollutants, these 'holistic' arguments about the allocation of state and federal rights, said to be rooted in the structure of the statute, simply overlook its plain language"). There is no reason to think that the Second Circuit would take a different approach if presented with a case arising after promulgation of the final rule.

A decision by this Court on the plain language of the statute would remove the confusion over an important statutory provision that affects some of the most basic services provided by State and local government: water management and allocation. It would foreordain the result of the pending rule challenge, which otherwise will be governed by the Eleventh Circuit's decision in this case, and also

guide any future revision of the rule. This certainty would allow those in charge of local water management to move forward with planning for water management needs.

In contrast, waiting for EPA to review its position and issue a new rule will only result in another decade of delay. If EPA were to change its position, that will simply lead to another rule challenge in which the same three arguments will be made and costly litigation will again occur—diverting scarce resources to litigation instead of water management and pollution control, and further postponing clarity that is needed now. The already decade-long confusion over what should be a straightforward, plain text reading of the statute should not be allowed to continue simply to allow a new shift in position by a new Administration.

Local governments need to deal with already ripe problems of managing scarce water resources to thirstier and thirstier cities, agricultural interests, ecological interests, and industry. Doing so requires the legal clarity that, now, only this Court can provide. Further delay will not refine the issue or provide a better vehicle to address it.

CONCLUSION

Certiorari should be granted and the question presented restated as set forth by United States Sugar Corporation.

Respectfully submitted.

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Nos. 10-196, 10-252

In the Supreme Court of the United States

FRIENDS OF THE EVERGLADES, ET AL.,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DIST., ET AL.,

Respondents.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DIST., ET AL.,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT UNITED STATES SUGAR CORPORATION

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SUPPLEMENTAL BRIEF FOR RESPONDENT UNITED STATES SUGAR CORPORATION

Every party but the United States agrees that the Eleventh Circuit's decision brings intolerable uncertainty to an issue of immense national importance. Amici, representing a wide variety of stakeholders across the Nation, concur that this Court's review is urgently needed. This Court itself recognized the importance of the issue by granting certiorari in *SFWMD* v. *Miccosukee Tribe*, and by flagging there, but explicitly leaving for another day, the question that this case presents.

The United States does not question the profound importance of the issue to the Nation. It instead offers three reasons why this Court should permit further delay, cost, and uncertainty. Its arguments are wrong and should not discourage the Court from granting review.

1. The United States argues (at 9-13) that the Eleventh Circuit correctly determined that the relevant statutory provisions are ambiguous. Its position is shocking. Dating back to the passage of the Clean Water Act in 1972, the EPA has steadfastly maintained that a Section 402 permit is required "only if the point source itself physically introduces a pollutant into water from the outside world." *Gorsuch*, 693 F.2d at 175; see *id.* at 167 (EPA's interpretation "was made contemporaneously with the passage of the Act, and has been consistently adhered to since").

The Government's new endorsement of ambiguity is flatly contrary to the position it took in *Miccosukee*. As we explained in our earlier brief (at

6-8), the United States there advanced a "straightforward" reading of the Act's "express terms," "text and structure." It did not so much as hint that the CWA might be ambiguous. And the one time it noted that two Circuit Court cases deferred to the EPA's interpretation, it quickly emphasized that those decisions "also follo[w] *based on a straightforward reading of the Clean Water Act's text.*" U.S. Amicus Br., No. 02-626, at 17 n.4 (emphasis added).

The Government's current position is even at odds with its position in the Eleventh Circuit. There, the United States argued that "a straightforward reading of the statute leads to precisely the * * * conclusion" that the "district court erred in concluding that the CWA requires NPDES permits for water transfers." U.S. Br. as Appellant 24.

The Government's startling about-face, which implies it has the power to require NPDES permits for each of the millions of diversions of navigable waters across the Nation, is a major source of uncertainty that justifies this Court's present review.

2. The Government's argument for ambiguity also fails on the merits. The United States now believes (at 10) that "the term 'navigable waters,' in ordinary usage, can refer either to 'individual water bodies' or to 'a collective whole.'" Perhaps that might support ambiguity if "navigable waters" were left undefined, but Congress explicitly defined "navigable waters" as "*the* waters of the United States." CWA § 502(7), 33 U.S.C. § 1362(7) (emphasis added). Only a tortured reading could support a conclusion that Congress meant the "individual water bodies of the waters of the United States" when it defined "navigable waters" as it did. See Br. for U.S. Sugar Corp. at 19-21.

The United States also sees ambiguity in the CWA's use of the phrase "*any* navigable waters" in *other* places. U.S. Br. at 11. But Congress's choice to use the phrase "any navigable waters" in different sections and yet omit the crucial word "any" in the relevant provisions unambiguously supports *respondents'* reading of the statute, for "'Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another.'" *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 537 (1994); see *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) (use of different terms "only underscores our duty to refrain from reading a phrase into the statute when Congress has left it out").

This bedrock principle of statutory interpretation applies with special force here. As the United States observes (at 11), Congress used the different phrase "*any* navigable waters" in Section 304(f). 33 U.S.C. § 1314(f)(2)(F) (emphasis added). Far from dealing with the Section 402 permitting regime, Section 304(f) addresses "methods to control pollution resulting from * * * changes in the movement, flow, or circulation of any navigable waters * * *, including changes caused by the construction of * * * flow diversion facilities." *Ibid.* Section 304(f) fortifies respondents' reading that Congress meant for flow diversion facilities, like the pump stations at issue in this case, to be addressed under *State* nonpoint source programs, not the NPDES regime. See *ibid.* (headed "Identification and evaluation of nonpoint sources of pollution"). Any other reading renders Section 304(f) meaningless.

3. The United States says (at 19-20) that there is no circuit conflict because the decisions in *Dubois*

and *Catskills* that the CWA requires permits for water transfers were issued before EPA's rule took effect. That argument is far too formalistic given the language in the First and Second Circuits' opinions.

In the *Catskills* cases, the Second Circuit required the City of New York to obtain a Section 402 permit for diverting unfiltered drinking water to its millions of residents because the water diversions increase the "turbidity" of a creek frequented by sportfishers. See Br. Amicus Curiae of City of N.Y. In so holding, the Second Circuit rejected EPA's long-standing interpretations of the Act based on what the court considered to be the Act's plain meaning. Applying *Skidmore*, *Catskills I* concluded that EPA's interpretation did not "have the 'power to persuade'" because "the transfer of water containing pollutants from one body of water to another, distinct body of water is plainly an addition and thus a 'discharge' that demands an NPDES permit." 273 F.3d at 491. "Given the ordinary meaning of the CWA's text," it continued, "we cannot accept * * * a 'singular entity' theory of navigable waters, in which an addition to one water body is deemed an addition to all of the waters of the United States." *Id.* at 493. "Such an interpretation is inconsistent with the ordinary meaning of the word 'addition.'" *Ibid.*; see also *id.* at 494 (describing "what we find to be the plain meaning of [the] text").

Catskills II reaffirmed *Catskills I* after *Miccosukee*. The Second Circuit reiterated that it "do[es] not find the [EPA's] argument persuasive and therefore decline[s] to defer to the EPA." 451 F.3d at 83 n.5. It believed that the City and the EPA "simply overlook [the Act's] plain language." *Id.* at 84. The First Circuit in *Dubois* was just as categorical in

rejecting EPA's interpretation. 102 F.3d at 1296 ("There is no basis in law or fact for the district court's 'singular entity' theory").

Accordingly, the Government's proposed distinction is technically correct, but in practice irrelevant. The First and Second Circuits adopted (erroneous) views of the plain language of the CWA that contradict the Eleventh Circuit's finding of ambiguity, and required permits when the Eleventh Circuit requires none. The conflicting decisions of the Courts of Appeals warrant this Court's intervention.

4. The Government contends (at 20, 21 n.8) that review is not needed because EPA might "reconsider" its current rule and a challenge "as to the permissibility" of a reconsidered rule is "hypothetical." In fact, uncertainty over whether, when, and how the EPA might change its rule only underlines the need for this Court's immediate review.

A new rule would shed no light at all on the question presented, which "rests primarily upon the proper interpretation of a few words of the CWA." Friends Pet. App. 132a-133a. There are only three ways to read the relevant provisions: they unambiguously do not require a Section 402 permit for diversions of navigable waters; they unambiguously do require a Section 402 permit; or they are ambiguous and EPA's interpretation controls. A different EPA rule would not alter those choices. And if the statute is *un*ambiguous, as all parties and amici but the United States contend, then EPA's interpretation has no legal effect anyway. *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'"). There is

nothing "hypothetical" about the inquiry the parties ask this Court to make.

A rule change, on the other hand, is certain to lead to more litigation, with its concomitant costs. EPA's 2008 rule was challenged, including by petitioners in this case, and that challenge remains pending in the Eleventh Circuit. If EPA dramatically reverses course and decides that flow diversion facilities require NPDES permits, then States, cities, companies, and organizations that depend on water transfers will challenge that rule as well. Controversies regarding the proper interpretation of the CWA will not go away simply because the EPA adopts a different interpretation. And while these challenges are ongoing, a subsequent Administration could change the rule again, restarting the endless cycle of litigation.

This case demonstrates the unfortunate delay that any similar controversy must endure. Plaintiffs here filed suit in 2002, the same year that defendants in this case filed a petition for a writ of certiorari in *Miccosukee*. It has taken 8 years for essentially the same controversy between essentially the same parties to be decided by the District Court and Eleventh Circuit before finally returning to this Court. There is every reason to believe that if these petitions are denied, another decade or more of litigation is inevitable.

To understand the tremendous costs of not having a governing nationwide interpretation, one need look no further than *Catskills*. As New York City explains in its amicus brief, in 2000 sportfishing and environmental organizations sued the City for diverting a reservoir through a tunnel and into a creek to bring drinking water to its millions of

residents. Since then, the City has paid over $5.2 million in penalties and hundreds of thousands of dollars in plaintiffs' attorneys' fees and costs, not to mention the costs of its own defense. And after the Second Circuit erroneously required the City to apply for a Section 402 permit, and after the City obtained a permit, the same plaintiffs attacked the permit in state court. The state court found the permit to be defective and ordered the City to reapply for a new permit. The City has done so but expects any new permit to be challenged as well. Even if it obtains a permit, the City will likely violate the permit's terms—because "due to natural conditions, it will never be able to consistently ensure that the diversion has no substantial visible contrast to the receiving waters"—leaving it exposed to further litigation and penalties.

Similar suits could spring up anywhere. See *Gorsuch*, 693 F.2d at 182 (as of 1982, Nation had 2 million dams). Each controversy is enormously costly for defendants, but those litigation costs pale in comparison to a determination that a Section 402 permit is required for transfers of navigable waters. As amici explain, given the characteristics of natural snowmelt, it might be impossible to comply with a Section 402 permit. Br. of Amici Curiae City and County of Denver et al. 14 ("the NPDES approach may not be economically or technically feasible, politically acceptable, or environmentally desirable for many essential water transfers"). If such water transfers are made unlawful, then the viability of the West's great cities is called into question. See Br. of Amici Curiae States of Colorado et al. 3 (mentioning, among others, Denver, Los Angeles, Las Vegas, Phoenix, Salt Lake City, San Diego, San Francisco, and Seattle, all of which depend on water transfers).

Uncertainty and delay also exact tremendous costs on water transfer projects that are yet to be completed. Amici explain that the continued growth of the West and a diminishing supply of water as a result of climate change necessitate "new water transfers to meet demand." Br. of Amici Curiae City and County of Denver et al. 8. There is a tremendous disincentive to build those projects if costs cannot be ascertained. Indeed, as amici point out, the cost of *one* plant to treat natural water flow to comply with NPDES could double the costs of the same project that diverts water across the Continental Divide to roughly one million people. *Id.* at 13. The looming uncertainty over the viability of similar projects across the Nation counsels in favor of, not against, this Court's review.

* * *

The Circuit Courts are divided, EPA has suggested it is rethinking its 38-year-old interpretation, and expensive and protracted litigation shows no signs of abating. All interested stakeholders are left wondering what the law of the Nation is. This Court should grant the petitions for a writ of certiorari now and provide an answer to this fundamentally important question.

CONCLUSION

For the reasons set forth above and in the Brief for Respondent United States Sugar Corporation, certiorari should be granted.

Respectfully submitted.

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In The

Supreme Court of the United States

FRIENDS OF THE EVERGLADES, ET AL.,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ET AL.,

Respondents.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, ET AL.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT SOUTH FLORIDA WATER MANAGEMENT DISTRICT AND CAROL WEHLE

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SUPPLEMENTAL BRIEF FOR RESPONDENT SOUTH FLORIDA WATER MANAGEMENT DISTRICT AND CAROL WEHLE

It is telling that the federal government stands alone in its attempt to dissuade review. The arguments it enlists and its very reason for making them belie that aim. But first it is worth noting two points that the United States does not argue. It makes no pretense that the question presented is not of paramount national importance. The *amicus* briefs filed here and in *Miccosukee*, hundreds of comments submitted to EPA during its rulemaking and dozens of Petitions challenging EPA's rule, by groups representing thousands, attest to the fundamental concerns at stake. Nor is there any pretense that the question presented – the well warmed subject of several prior and pending suits – has not percolated long enough. Unlike *Miccosukee*, the parties' arguments here were honed well below and crystallized into a clear and focused point of interpretive law. In short, this matter indisputably presents a critically important and concise, albeit sharply divisive, interpretive question that is plainly ripe for review.

The arguments made to escape review and maintain EPA's newfound discretion to extend NPDES over state water managers are troubling. In essence, the government capitulates to finding the distinct-waters approach a "plausible" reading by abandoning core principles and traditional tools of statutory construction that had grounded its previously steadfast and stern rejection of it. In the end, its arguments

should have the effect of encouraging not discouraging review.

1. The government's superficial summary of textual and structural arguments in support of both approaches is not helpful as it fails to confirm the plausibility of either (at 11). It rather epitomizes the "uncritical use of interpretive rules" reproached by the Court in *S.D. Warren*.[1] It is also not what the Solicitor General presented this Court in *Miccosukee*. There, the United States recognized that the distinct-waters test "reaches far beyond the Clean Water Act's terms."[2] It further acknowledged that "[t]he text and structure of the Clean Water Act *make clear* that Congress had no intention to subject [water-transfers] * * * to the NPDES permitting regime"[3] and that the CWA's defining language "*cannot reasonably be understood* to include" water transfers.[4] (emphasis supplied).

The government's juxtaposition of statutory arguments attempts to fog the clarity of its otherwise longstanding position. But the facial complexity of the CWA provides more, not less, reason to critically

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[1] 547 U.S. 370, 380 (2006) ("It should go without saying that uncritical use of interpretive rules is especially risky in making sense of a complicated statue like the Clean Water Act, where technical definitions are worked out with great effort in the legislative process").

[2] Brief of the U.S. in *Miccosukee*, 2003 WL 22137034 at *13.

[3] *Id.* at *15.

[4] *Id.* at *16.

scrutinize it for meaning and congressional intent. At bottom, the government's new stance, like the opinion below, cannot be reconciled with its past positions or withstand the critical scrutiny expected by decisions of this Court.

2. Starkly absent from the government's analysis are the fundamental federalism principles that drove its longstanding adherence to the unitary waters approach. Both the United States' brief in *Miccosukee* and the preamble of the water-transfer rule confirm the relevance and importance of those abandoned values.

The United States used to share Congress' respect for State rights and responsibilities expressed in the CWA's statements of policy and exercised by the States through water-transfers. In its preamble, EPA explained the current water-transfers rule "appropriately defers to congressional concerns that the statute not unnecessarily burden water quantity management activities" in excluding water transfers from NPDES.[5] It continues:

> A holistic approach to the text of the CWA is needed here in particular because the heart of this matter is the balance Congress created between federal and State oversight of activities affecting the nation's waters. The purpose of the CWA is to protect water quality.

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[5] NPDES Water Transfers Rule, 73 Fed. Reg. 33697, 33700 col. 1.

> Congress nonetheless recognized that programs already existed at the State and local levels for managing water quantity, and it recognized the delicate relationship between the CWA and State and local programs.[6]

The rule's preamble also openly respected the very principles of federalism and canons of construction upon which the non-federal respondents rely and which belie the United States current position.

> Because subjecting water transfers to a federal permitting scheme could unnecessarily interfere with State decisions on allocations of water rights, [Section 101(g), 33 U.S.C. 1251(g)] provides additional support for the Agency's interpretation that, absent a clear Congressional intent to the contrary, it is reasonable to read the statute as not requiring NPDES permits for water transfers. *See United States v. Bass*, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.")[7]

In *Miccosukee*, the United States proposed that if Congress intended to prohibit unpermitted water-transfers "it would have made that extraordinary intention manifest."[8] Instead, "Congress recognized

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[6] *Id.* at 33701 col. 3.

[7] *Id.* at 33702 col. 1-2.

[8] Brief of the U.S. in *Miccosukee*, 2003 WL 22137034 at *19.

that the States have important responsibilities in distributing and allocating water and that the Clean Water Act's requirements should not unduly interfere with those responsibilities."[9]

Even if the Court viewed the distinct-waters approach as plausible, these principles of federalism make that approach nonetheless impermissible and, therefore, preclude deference. The government does not explain its failure to pay them any respect in this case.

3. The government's brief serves only to exacerbate the already intolerable regulatory uncertainty that led these respondents and their supporting *amici* to this Court, despite concurring with the judgment below. EPA initiated rulemaking after *Miccosukee* because the Court "left unresolved the uncertainty many felt about the need for an NPDES permit."[10] The water transfers rule was issued to "resolve the confusion created by [the courts'] conflicting approaches."[11] What certainty was provided is plainly gone.

By reaffirming that EPA is intent and remains "in the process of reconsidering its water-transfers rule" (at 9), the government has abandoned its supporters and only promised the nation many more years of contentious rulemaking and litigation. The analysis

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[9] *Id.* at *14.

[10] *See, e.g.*, EPA Press Release at http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceceeac8525735900400c27/66d1aca0a9c7030d852574630051e99b!OpenDocument.

[11] Water Transfers Rule at 33701 col. 2.

it now presents demonstrates its willingness to abandon fundamental principles to achieve that end.

These respondents have shown that this case in particular implicates public works that are subject of the world's largest restoration program. Projects that are already suffering from significant delays and billion dollar cost overruns and that the government has conceded would be hindered by the extension of NPDES. At the end of the day, the United States offers no reason that the nation should be left with continued uncertainty and the inevitable litigation to come. There is nothing hypothetical about the chilling effect of the government's ongoing conduct.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
CAROL WEHLE, EXECUTIVE DIRECTOR
UNITED STATES OF AMERICA
U.S. SUGAR CORPORATION,

Respondents.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION

I. Certiorari Is Warranted Because This Case Presents An Exceptionally Important Question Of Statutory Interpretation Implicating National Interests In Water Quality And Enforcement Of The Clean Water Act

To Petitioner, the Miccosukee Tribe of Indians of Florida ("Tribe"), this case presents an important issue because the "unitary waters" theory allows pollutants to be discharged into Tribal lands without a permit. Others believe the "unitary waters" theory is an issue that implicates water management activities across the country.

Certiorari is warranted to decide the important question of whether the language and purpose of the Clean Water Act ("CWA") reasonably permit a statutory construction that would allow the most polluted navigable waters to be pumped into the most pristine without an NPDES permit. The Environmental Protection Agency ("EPA") Regulation at issue here (73 Fed. Reg. 33697; 40 CFR 122.3(i)), which the Eleventh Circuit found outcome-determinative and entitled to deference, allows just that result under the thoroughly discredited "unitary waters" theory. The Court should address whether the plain language of the CWA prohibits EPA's interpretation.

Only the United States (hereinafter "USA") opposes certiorari review. USA takes the position that the Eleventh Circuit correctly concluded that the CWA is susceptible to two conflicting interpretations, both of which are reasonable, and EPA's Regulation is therefore entitled to deference. No other party or *amicus* agrees, and a plain reading of the CWA refutes this argument.

USA's suggestion that this Court should not grant certiorari because EPA "might" reconsider the Regulation is likewise a position shared by no one else in this case and not a persuasive argument against certiorari.[1] Moreover, given the history of broken promises to the Tribe by USA, any new promises of future action by EPA lack credibility.

Six years ago in *South Florida Water Management District v. Miccosukee*, 541 U.S. 95 (2004), the Tribe asked this Court to protect Tribal Everglades from pollutants being discharged without permits. This Court remanded *Miccosukee* for consideration by the district court of whether the canals and Tribal Everglades were meaningfully distinct, while criticizing, but leaving open for argument below, the "unitary waters" theory. The *Miccosukee* case remains unresolved, having been stayed by the district court pending resolution of this case. Since *Miccosukee*, the SFWMD and others continue to take the position that they can discharge without permits. The district court in this case concluded that the CWA was unambiguous with regard to the requirements for permits. Every other court that has considered the "unitary waters" theory has rejected it. Once again, the Tribe seeks review from this Court to protect its lands, and to resolve the issue left open in *Miccosukee* as to whether the "unitary waters" theory is inconsistent with the statute's plain language.

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[1] For example, USA's voluntary cessation of challenged conduct does not render the case moot because there is reasonable expectation that the wrong will be repeated. *Deakins v. Monaghan*, 484 U.S. 193, 200 n.4 (1988). And where "nothing prevents the Executive from returning to the road it earlier constructed and defended," its "voluntary cessation does not make a case less capable of repetition or less evasive of review." *Padilla v. Hanft*, 126 S. Ct. 1649, 1651 (2006) (Ginsburg, J., dissenting from denial of certiorari).

II. Certiorari Is Warranted Because EPA's Regulation Is Not Entitled To Deference Under This Court's Precedents

A. Deference to EPA's Interpretation is Improper Because the CWA's Plain Language Requires Permits for Water Transfers between Separate Bodies of "Navigable Waters"

Contrary to USA's argument, the CWA is *not* ambiguous as to whether a water transfer is subject to the NPDES permit requirements. U.S.A. at 10. Therefore, no deference is owed to EPA's Regulation. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

USA attempts to inject ambiguity into an otherwise plain statute by using an "absent any" argument, just as the Eleventh Circuit did. USA at 10-11. Because the word "any" does not appear before "navigable waters" in Section 301(a) (codified, 33 U.S.C. § 1311(a)), USA argues that the statute should be interpreted to mean that waters of the United States are a unitary whole. *Id.* But as the Tribe pointed out, the "absent any" argument was not the focus of EPA in promulgating the Regulation and thus no deference is owed under that theory. Tribe's Pet. at 17. The Eleventh Circuit merely adopted EPA's litigation position below, which is not the same as giving deference to an agency's interpretation of an ambiguous statute. *Id.*

Moreover, a key term in the Section 1361(12) language "any addition of any pollutant to navigable waters from any point source" is the phrase "any addition." Tribe's Pet. at 17-18. As the district court here found, that term unambiguously means that permits are required whenever there is something *added* to "navigable waters." The *Miccosukee* Court concluded that the "addition" must be from another

meaningfully distinct body of water. *Id.* The "unitary waters" theory is inconsistent with this Court's interpretation of "addition" and USA offers no persuasive explanation of its litigation position adopted as a Regulation.

Likewise, USA offers no response to the Tribe's argument that "navigable waters" is used in the statute as a jurisdictional term to identify those bodies of water that are subject to federal regulation, and that the originating location or character of the waters being discharged into "navigable waters" is not decisive under the statute. *Id.* at 18-19. What matters for determining if there is a "discharge" is whether there has been "any addition" of pollutants from another meaningfully distinct body of water.

B. Even if EPA's Regulation was a Reasonable Interpretation of an Ambiguous Statute, No Deference is Due under this Court's Decisions

Even assuming the Regulation was a reasonable construction of an ambiguous statute, USA is wrong that the Eleventh Circuit properly accorded deference.

Pursuant to *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), the prior decisions of the First and Second Circuit and district court below, finding the statute unambiguous, should control over EPA's subsequent interpretation. Tribe's Pet. at 19-20. USA argues that this is not so because no "binding precedent" prevented the Eleventh Circuit from deferring to EPA under *Chevron*. U.S.A. at 16. This argument incorrectly interprets *Brand X*. This Court did not hold, as USA suggests, that only *binding* precedent finding a statute unambiguous can control over a subsequent agency decision. *Brand X*, 545 U.S. at 982-83. This Court spoke in terms of "judicial precedent," *id.* at 982, which connotes

merely "[a] decided case that furnishes a basis for determining later cases involving similar facts or issues," *Garner v. United States*, 85 Fed. Cl. 756, 759 (Fed. Cl. 2009) (quoting Black's Law Dictionary). By contrast, "binding precedent" means "[a] precedent that a court must follow." *Id.*

The Second Circuit's determination in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 85 (2d Cir. 2006), is "precedent" which found that the "unitary waters" theory conflicts with the plain language of the CWA. Indeed, in that case the court repeatedly said that its decision was mandated by "the text of the CWA" and the statute's "plain language."[2] *Id.* at 85. For the same reasons, the First Circuit's decision in *Dubois v. U.S.D.A.*, 102 F.3d 1273, 1299 (1st Cir. 1996) is also precedent that controls. Thus, contrary to USA's position, a fair interpretation of *Brand X* is that deference to the agency was foreclosed by prior judicial precedent from other circuits.[3]

USA argues it does not matter that EPA's interpretation

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[2] USA contends that the Second Circuit's ruling should be ignored because *Catskill II* was decided before the Regulation was promulgated and thus did not address the precise question presented here. U.S.A. at 16. This argument has no merit. *Brand X*, by its very terms, addresses the force of a prior judicial decision when a court is confronted with a *subsequent* agency interpretation. 545 U.S. at 982-83. Moreover, when deciding *Catskill II*, the Second Circuit was aware of the proposed regulations, which changed only slightly upon issuance. 451 F.3d at 82.

[3] As the Tribe noted in its Petition, at the very least there remains a question as to the force that prior judicial determinations of no ambiguity *by a sister circuit* carry under *Brand X*'s agency-reversal rule, and *Brand X*'s application in that regard is another question which review could appropriately resolve.

was previously rejected, citing *Barnhart v. Walton*, 535 U.S. 212, 221 (2002). But USA fails to even mention the import of *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869, 2887 (2010) which, as the Tribe explained, suggests no deference was due since the "unitary waters" theory was rejected as unreasonable by courts employing the usual tools of construction (and looked upon with skepticism by this Court). Tribe's Pet. at 23.

That the Regulation constitutes a mere *post hoc* rationalization and convenient adoption of EPA's litigating position is yet another reason, under this Court's precedent, that the Eleventh Circuit wrongly accorded deference. Tribe's Pet. at 24-25. USA argues that this is not so, citing as the Eleventh Circuit did, three cases, including *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996). U.S.A. at 13-15. As the Tribe's Petition explained, however, none of those cases involved, as here, the adoption by the agency of a case-decisive losing litigation position in order to reverse the outcome of the case on appeal. Tribe's Pet. at 26-27.

USA characterizes *Smiley* as a case in which *Chevron* deference was given to "a rule adopted after, and in direct response to, the lower court decision in that case[.]" U.S.A. at 14-15. That characterization is misleading. The circumstances of *Smiley* are different because the rule was not adopted until after the state supreme court issued its decision, and there is no indication that the rule adopted a mere losing argument in the trial court, intermediate appellate court, or state supreme court. Here, the proposed language of the Regulation was presented as argument to the district court, which rejected it out of hand. Then, after appellate briefing, the Regulation was adopted and submitted to the court as supplemental authority under Rule 28(j), in order to

invoke *Chevron* review and change the outcome of the case.[4] The Eleventh Circuit should have bound USA to the theories argued below in order to avoid prejudice to the Tribe and Plaintiffs, who did not have an opportunity to brief arguments relating to the final Regulation.

To that end, the Eleventh Circuit's decision permitted an executive agency to manipulate the case's outcome in violation of separation of powers.[5] USA argues that the Tribe's reliance on *United States v. Klein*, 80 U.S. 128 (1871) is incorrect, but fails to respond to the argument that *Klein*, even as limited by progeny, applies because Congress has not changed the law. This Court has said that *Klein*'s holding remains in full force except where Congress amends applicable law. Because no law was amended here, EPA's promulgation of the Regulation, after briefing in the Eleventh Circuit so as to invite *Chevron* deference, presents a separation of powers problem under *Klein*.

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[4] USA's submission of the Regulation during the appeal – by way of a Rule 28(j) letter – was highly prejudicial, procedurally improper, and violated the prudential rule that parties cannot raise new issues or arguments by supplemental authority.

[5] USA argues that this Court should not consider the separation of powers argument because it was not raised in the petitions for rehearing below. U.S.A. at 18 n.7. Given that EPA did not adopt the Regulation until after briefing in the appeal and that petitions for rehearing are not prerequisites to Supreme Court review, this argument lacks merit. Because USA has manipulated the outcome by waiting to issue the Regulation after briefing was complete, it is estopped from attempting to prevent the Tribe from raising the argument. Moreover, "[this Court] may make exceptions to [its] general approach to claims not raised below," especially where "the parties have argued the matter in their briefs here; and [the Court's] deciding the matter now will reduce the likelihood of further litigation." *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2286 (2009).

The only answer provided by USA is that "Congress intended to vest EPA with significant discretion, and the water-transfer rule is a permissible exercise of that discretion." USA at 18. The issue, however, is not whether Congress vested discretion in the agency to promulgate regulations. The issue is whether the circumstances under which the agency promulgated the Regulation here pose a separation of powers issue. Clearly they do. EPA's promulgation of the Regulation after briefing in the appellate court was specifically targeted to change the case's outcome and implicates separation of powers.

III. Certiorari Is Warranted Because The Eleventh Circuit's Decision Upholding EPA's Regulation Conflicts With *Miccosukee* And Other Circuit Precedents

A. The Decision Below Conflicts with *Miccosukee*

Rather than showing no conflict exists, USA mentions various facts about *Miccosukee* which support the Tribe's position. For instance, there is no dispute that an NPDES permit is required to convey water from one meaningfully distinct body of water to another. U.S.A. at 6 n.2. The Eleventh Circuit upheld the district court's finding that the canals and Lake Okeechobee were "meaningfully distinct water bodies." *Id.* at 7 n.3. Additionally, this Court held the term "point source" includes structures that are not the original source of the pollutant. *Id.* at 5; *Miccosukee*, 541 U.S. at 105 (holding "untenable" the position that a point source must be original source of pollution). These facts support the argument that the transfer of pollutants from one distinct water body into another requires a permit, regardless of whether both bodies are waters of the United States.

Yet, USA continues to assert that pumping polluted water from the canals into Lake Okeechobee does not constitute a

discharge of pollutants because waters of the United States are "unitary." Such a construction eviscerates the CWA and is not supported by the statute's plain language.

The Eleventh Circuit's holding, which found the Regulation reasonable, is inconsistent with *Miccosukee* because the conveyances in question involve pumping water from one distinct, polluted water body into another distinct water body that is also a drinking source. This activity is clearly subject to NPDES permitting both under the Eleventh Circuit's own ruling that the water bodies involved are meaningfully distinct, and under this Court's ruling that an NPDES permit is required to convey polluted water from one meaningfully distinct body to another. Under EPA's Regulation, however, water transfers involving two bodies of "navigable waters" are exempt from permit requirements *unless* pollutants are injected during and by the transferring activity itself. In other words, the Regulation requires that the point source *must* be the original source of the pollutant – a conclusion that is exactly the opposite of this Court's holding in *Miccosukee*. Thus, when the Eleventh Circuit found the Regulation reasonable, it created a conflict with *Miccosukee*, which this Court should resolve. [6]

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[6] This Court left the "unitary waters" theory open on remand, but the Court never held that the theory, if made a regulation, would be entitled to deference under *Chevron*. The Court in fact expressed skepticism toward the theory and its reasonableness, noting several potential inconsistencies that might foreclose it. *Miccosukee*, 541 U.S. at 107-08.

B. The Decision Below Conflicts with Other Circuit Precedents

Both *Dubois*, 102 F.3d at 1273, and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ("*Catskill I*"), *adhered to on reconsideration*, 451 F.3d at 77 (2d Cir. 2006) ("*Catskill II*"), held the "unitary waters" theory untenable under the CWA's plain language. That the First and Second Circuits had no occasion to consider EPA's Regulation is irrelevant because both courts considered the "unitary waters" theory and found it unreasonable.

Under *Brand X*, 545 U.S. at 982-83, therefore, the *Chevron* framework would not apply because both circuit holdings were based on the clear statutory language and those prior precedents would defeat EPA's subsequent contrary interpretation. In other words, had the "unitary waters" Regulation been challenged in the First or Second Circuits, rather than in the Eleventh Circuit, the Regulation would have been rejected and not accorded deference under existing First and Second Circuit law. This conflicts with the Eleventh Circuit's opinion, which holds the Regulation reasonable. It also creates the anomalous result that a Regulation can be upheld in one circuit under *Chevron* while in other circuits rejected pursuant to *Brand X*.

Even if *Chevron* were applicable, however, the Regulation would still have to be rejected under First and Second Circuit precedents under step one of *Chevron* because both circuits concluded the "unitary waters" theory was inconsistent with the CWA's plain language. *Catskill II*, 451 F.3d at 84-85. The theory would likewise be rejected as unreasonable under *Chevron* step two. Indeed, the *Dubois* court called the theory "irrational," *Dubois*, 102 F.3d at 1297, and *Catskill II* found it "absurd." *Catskill II*, 451 F.3d at 81.

Thus, both the First and Second Circuits found the "unitary waters" theory was an unreasonable interpretation of the plain statutory language. In stark contrast, the Eleventh Circuit found the statutory language was not plain, and that the "unitary waters" theory was a reasonable interpretation.

CONCLUSION

For these reasons and those in the Tribe's Petition, the Court should grant certiorari.

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In The
Supreme Court of the United States

FRIENDS OF THE EVERGLADES, *et al.*,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, *et al.*,

Respondents.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, *et al.*,

Respondents.

On Petitions For A Writ Of *Certiorari* To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* CITY AND COUNTY OF DENVER ACTING BY AND THROUGH ITS BOARD OF WATER COMMISSIONERS, NORTHERN COLORADO WATER CONSERVANCY DISTRICT, CITY OF AURORA [COLORADO] IN SUPPORT OF RESPONDENTS SOUTH FLORIDA WATER MANAGEMENT DISTRICT, *ET AL.*

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QUESTION PRESENTED

Residents of the West rely on *Amici* and other municipal water providers to transfer billions of gallons of water every day to meet their basic water needs. The Eleventh Circuit's decision, however, causes significant uncertainty with regard to the applicability of the Clean Water Act's permitting requirements to – and the continued viability of – such essential water transfers. The question the Court should address is:

> Whether the Eleventh Circuit erred by failing to follow a basic tenet of constitutional law that the courts may not alter the established federal-state framework by permitting federal encroachment upon a traditional state power unless Congress conveys its intent clearly, thus allowing federal encroachment upon state water law and water rights in conflict with Congress's clear statements to the contrary.

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I. INTEREST OF *AMICI CURIAE*

Amici Curiae – municipal water providers – submit this brief pursuant to RULE 37.4 of this Court in support of the position of Respondents South Florida Water Management District *et al.* that the Court should grant the Petitions for a Writ of *Certiorari* to review *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009), *reh'g denied en banc*, 605 F.3d 962 (11th Cir. 2010).[1]

West of the 100th Meridian, the nation is generally arid; that is, the land receives less than the thirty inches of annual precipitation necessary to sustain non-irrigated agriculture. Further, most precipitation falls as snow, invariably far from the major urban and agricultural centers that need the water. *Amici*[2] and other municipal water providers must therefore capture water where and when the snow melts for transfer through complex systems of man-made and natural conveyances and reservoirs to meet year-round needs. For example, the majority of the precipitation in the seven-state Colorado River

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[1] Counsel of record for all parties received timely notice of the *Amici Curiae's* intent to file this brief pursuant to RULE 37.2(a).

[2] *Amici* Denver, Aurora, Metropolitan Water District of Southern California, Truckee Meadows, and Central Arizona Water Conservation District are members of the Western Urban Water Coalition. Other members include Oakland, San Francisco, Phoenix, San Diego, Seattle, Santa Clara Valley, and Las Vegas.

basin, an area encompassing 250,000 square miles, falls as snow on land at elevations above 9,000 feet – just five percent of the basin's land area. *Amici* and other municipal water providers capture and transfer this water to meet municipal water needs in cities like Phoenix, Tucson, and Las Vegas within the basin, and in cities outside the basin, including Los Angeles, San Diego and other southern California coastal cities, Denver, Boulder, Colorado Springs, Fort Collins, Pueblo, Cheyenne, Salt Lake City, Albuquerque, and Santa Fe. In short, water transfers are essential to the West's cities and towns.

Under individual water rights allocated pursuant to state water law, *Amici* and other municipal water providers in the western United States divert water from natural streams and lakes. Many then transfer that water through man-made tunnels, canals, and pipelines into other natural streams and lakes to meet the domestic, agricultural, commercial, and industrial water needs of residents. These water transfers can be as small as the diversion of water from a river by a rural town into a nearby (but hydrologically separate) stream for delivery to its residents or as massive as the transfer of water from the Sacramento River by the federal Central Valley Project and California State Water Project to serve tens of millions of residents throughout central and southern California.

The Metropolitan Water District of Southern California ("Metropolitan"), a public entity made up of 26 member public agencies, imports water from

the Colorado River through the Colorado River Aqueduct and from northern California through the California Aqueduct. *See* map at App. 1. Metropolitan delivers water to nearly 19 million people in a 5,200 square mile service area that includes Los Angeles, Orange, San Diego, Riverside, and Ventura counties. In fiscal year 2009-10, Metropolitan delivered approximately 1.78 million acre-feet of water, the equivalent of over 580 billion gallons.

The City & County of Denver acting by and through its Board of Water Commissioners ("Denver Water") provides an average of 65 billion gallons per year of potable, raw, and recycled water to approximately 1.3 million people in the Denver metro area. Denver Water diverts its supplies from 42 streams and numerous smaller tributaries and transfers it via two pump stations, 77 miles of canals, tunnels, siphons, and four trans-mountain tunnels. Water is stored in 13 reservoirs, with a combined storage capability of over 221 billion gallons. *See* map at App. 2.

The Central Arizona Project ("CAP"), operated by the Central Arizona Water Conservation District, is a 336-mile long water transfer system of pumping plants, concrete-lined canals, inverted siphons, tunnels, and pipelines that annually moves about 489 billion gallons of Colorado River water from Lake Havasu on the Colorado River to central and southern Arizona. The CAP water supply represents Arizona's largest renewable water supply; it serves municipal and industrial customers, non-Indian

agricultural users, and Indian communities. The service area of the CAP encompasses about 80 percent of Arizona's water users, including the Phoenix and Tucson metropolitan areas. There are at least three operational points on the CAP system that release Colorado River water into other waters of the United States. *See* map at App. 3.

The U.S. Bureau of Reclamation's Colorado-Big Thompson Project ("C-BT"), operated by the Northern Colorado Water Conservancy District ("Northern Water"), conveys an average of 74 billion gallons of water per year through the Rocky Mountains and under the Continental Divide to irrigate over 690,000 acres and supply approximately 830,000 people in 33 cities and towns and 16 water districts. C-BT diverts water from 4 source lakes, reservoirs, and streams, and conveys that water by gravity and 3 pump stations through 2 tunnels and 9 canals into at least 17 different streams, rivers, lakes, and reservoirs. *See* map at App. 4.

The City of Aurora is the third largest city in Colorado, with a population of 320,000. Nearly one-half of Aurora's water is supplied from sources in the Arkansas and Colorado River Basins. All of this water is collected at Twin Lakes and is transported to the South Platte Basin via the Otero Pump Station. Water transferred via the Otero Pump Station flows through the Homestake Pipeline and into an open channel to Aurora's Spinney Mountain Reservoir. Water is released from Spinney Mountain Reservoir down the Middle Fork of the South Platte River to

Strontia Springs Reservoir where it is again diverted and piped into Aurora for municipal use. *See* map at App. 5.

The Metropolitan Water District of Salt Lake & Sandy, Utah ("Metro") provides supplemental water that makes up a portion of the supply for an estimated 400,000 people in the Salt Lake Valley. Metro is the largest subscriber of water from the Provo River Project, a U.S. Bureau of Reclamation project completed between the 1930s and 1950s, and the second largest user of water from the Bonneville Unit of the Central Utah Project, another U.S. Bureau of Reclamation project. The Provo River Project includes the Duchesne Tunnel, a 388 million gallons per day ("MGD") capacity tunnel that transfers water from the Duchesne River to the Provo River, and the Weber-Provo Canal, a 646 MGD capacity canal that transfers water from the Weber River to the Provo River. The Bonneville Unit of the Central Utah Project is serving the needs of a growing population in large part through a trans-basin diversion of water from tributaries of the Duchesne River. *See* map at App. 6. Approximately half of Metro's water supply depends upon trans-basin diversions.

The San Juan-Chama Project ("Project") was authorized for construction by Congress in 1956. The Project imports water from the Colorado River basin into the Rio Grande basin, and consists of three diversions in Southern Colorado that divert water from the San Juan River, a tributary of the Colorado River, through a series of tunnels across the

Continental Divide and into Heron Lake on the Rio Chama. *See* map at App. 7. The Project imports about 35 billion gallons of water annually that is provided to San Juan-Chama Contractors at the outlet to Heron Lake. The Albuquerque Bernalillo County Water Utility Authority ("Authority") is the largest San Juan-Chama Contractor and holds a contract for approximately 16 billion gallons per year. This water is the key to the metropolitan Albuquerque area's water future to replace unsustainable ground water mining through the use of surface water. Currently, the Authority is constructing the $375 million Drinking Water Project to transition from the aquifer to San Juan-Chama water. The San Juan-Chama water currently constitutes 90 percent of Albuquerque's supply and will provide more than 70 percent of the supply in 2040.

II. REASONS FOR GRANTING THE PETITIONS

The Court should grant the Petitions for two principal reasons. First, the decision of the Eleventh Circuit conflicts with decisions of other circuits, fostering uncertainty regarding the regulation of water transfers under the Clean Water Act ("CWA" or "the Act"). This uncertainty impedes necessary water supply planning development and operational decision-making. Second, the ruling below ignores the basic tenet of constitutional law that courts may not "alter[ ] the established federal-state framework by permitting federal encroachment upon a traditional

state power . . . [u]nless Congress conveys its purpose clearly." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 173 (2001) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). The CWA, however, contains no clear Congressional statement that it intended to encroach on traditional state power to allocate water resources or to supersede or abrogate individual water rights allocated under state water laws. *See* 33 U.S.C. §§ 1251(b) and (g), 1370 (2010).

III. ARGUMENT

A. There is a Conflict Among the Circuits That Impedes Essential Water Supply Planning and Development.

Amici and other municipal water providers face increasing uncertainty from litigation over the applicability of CWA permitting requirements to water transfers. The First and Second Circuits have held that the plain language of the CWA requires National Pollutant Discharge Elimination System ("NPDES") permits for certain water transfers. *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1296 (1st Cir. 1996); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 84 (2d Cir. 2006). The *Catskill* court also rejected deference to the U.S. Environmental Protection Agency's ("EPA") interpretation of the CWA. 451 F.3d at 83 n.5. In this case, the Eleventh Circuit deferred to EPA, which had concluded that NPDES permits are not

necessary, creating a conflict among the circuits. *Friends of the Everglades*, 570 F.3d at 1227-28.

Additional uncertainty flows from the numerous challenges to EPA's Water Transfers Rule, which has been stayed pending resolution of this litigation. Order (Nov. 14, 2008), *Friends of the Everglades v. U.S. Envtl. Prot. Agency*, 08-13652-CC (11th Cir.) (consolidated with 08-13653-CC, 08-13657-CC, 08-14247-CC, 08-14471-CC, 08-14921-CC, 08-16270-CC, 08-16283-CC, 08-17189-CC, and 09-10506-CC). Moreover, EPA is reconsidering its Water Transfers Rule, which currently exempts water transfers from NPDES permitting. Resp. of U.S. to Pet. for Reh'g at 15, *Friends of the Everglades*, 605 F.3d at 962.

This uncertainty about the reach of the CWA interferes not only with the water supply planning and development of *Amici* and other municipal water providers who supply water to tens of millions of western residents every day, but also places a cloud over the continued viability of *Amici* and other municipal water providers' current water supplies. Further, even as the West continues to grow, its historical water supplies may be diminishing as a result of climate change, necessitating new water transfers to meet demand. *Amici* therefore urge the Court to grant *certiorari* to resolve the continuing uncertainty in the interests of judicial efficiency and economy, to end costly and burdensome litigation, and to remove uncertainty that impedes essential water supply planning, development, and operational decision-making.

B. The Clean Water Act Does Not Contain a "Clear and Manifest Statement" From Congress That Alters the Established Federal-State Framework and Permits Federal Encroachment Upon Traditional State Power to Allocate Water Resources.

The Eleventh Circuit's decision ignores the basic tenet of constitutional law that courts may not "alter[ ] the established federal-state framework by permitting federal encroachment upon a traditional state power . . . [u]nless Congress conveys its purpose clearly." *SWANCC*, 531 U.S. 173. *See also*, *Rapanos v. United States*, 547 U.S. 715, 738 (2006) ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority."). The CWA contains no such clear and manifest statement. In contrast, Congress clearly wrote deference to state water law directly into the statute. *See* 33 U.S.C. §§ 1251(b) and (g), 1370. Requiring NPDES permits for water transfers would abrogate state-allocated water rights by making it impossible for *Amici* and other municipal water providers to exercise their rights, as explained below.

In *South Florida Water Management District v. Miccosukee Tribe of Indians*, this Court theorized that construing the NPDES program to cover water transfers could raise the costs of water distribution prohibitively, which would impair the exercise of state-granted water rights. 541 U.S. 95, 108 (2004). To

avoid that result, this Court postulated that general permits might ameliorate the impact. *Id.* Unfortunately, general permits would provide no relief to water rights owners such as *Amici* and would, in practice, abrogate such water rights.

All NPDES permits – general as well as individual – must include limitations to comply with water quality standards. 33 U.S.C. §§ 1311(b)(1)(C), 1313(e)(3)(A) (2010). Moreover, "[n]o permit may be issued . . . [w]hen the conditions of the permit do not provide for compliance with the applicable requirements of CWA, or regulations promulgated under CWA." 40 C.F.R. § 122.4 (2010). If required to operate under NPDES permits, *Amici* and other water suppliers would have no alternative but to curtail their transfers because construction of treatment facilities designed to capture spring runoff and meet the effluent discharge limits of the CWA would be cost prohibitive and impractical.

1. Water Quality Standards.

If a discharge merely has the "potential to cause . . . an excursion above any State water quality standard," its NPDES permit must contain conditions to control all contributing pollutants. 40 C.F.R. § 122.44(d)(1)(i) (2010). *See also, Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 309 (9th Cir. 1993) ("The [CWA] does not impose liability only where a point source discharge creates a net increase in the level of pollution. Rather, the Act

categorically prohibits any discharge of a pollutant from a point source without a permit."). Thus, an NPDES permit would be necessary even where no impairment is in evidence, and such permit would contain conditions that limit the amount of pollutants delivered to the receiving waters, even where standards are in fact met, simply based upon a determination that there might be a potential cause of an exceedance.

Meeting such permit conditions would be impossible in many instances simply due to natural conditions, such as high turbidity (muddiness) during spring runoff or following heavy rainfall events. Further, water quality almost inevitably varies between basins. The movement of water from one basin to another could be subject to permit requirements even though the transferor has no ability to control naturally-occurring or ubiquitous pollution. The only sure way for an operator of a water transfer to control introduction of different pollutants into receiving waters would be to transfer no water at all.

Colorado, for example, has adopted water quality standards for thirty-six different naturally-occurring pollutants, including suspended solids. 5 COLO. CODE REGS. § 1002-31.16 (2010). The presence of these constituents is influenced by snowmelt, rain runoff, and reservoir storage. Water quality standards include numerous metals commonly present downstream from Colorado's mineralized mountains. *Id.* Runoff from snowmelt and storm events naturally contains elevated levels of total suspended solids, i.e.,

particles of soil and sediment, and turbidity from erosion caused by rapid runoff and accompanying high stream flows. As runoff flows from the mountains to the plains below, it deposits these regulated parameters directly into water conveyances, which are typically open canals and ditches. The source water itself, such as the headwaters of the Colorado River, may be naturally high in total dissolved solids such as salts as a result of its passage through saline geological formations and inflows from brackish hot springs. Although suspended solids and turbidity conveyed into a stream or open ditch may eventually settle out downstream, their temporary presence could contribute to loadings in the receiving waters that would exceed water quality standards. Such exceedances – even though a result of natural processes – would expose the water transferor to enforcement action and citizen suits. 33 U.S.C. §§ 1313, 1365 (2010). Similar concerns would arise relative to temperature regulations as water is transported through a variety of elevations with different climate regimes or is transferred from reservoir storage, where it has typically warmed, to potentially colder receiving waters.

2. Inability to Treat Transfers.

To avoid the potential to cause an excursion above the water quality standards of the receiving water body during spring runoff or following a thunderstorm, the water providers using water transfers might have to expend hundreds of millions of dollars

to construct one or more treatment facilities to reduce the presence of even the naturally occurring constituents described above. Each facility would be required to treat peak flows – which might occur just one or two days a year during spring snowmelt – to avoid violating the water quality standards of receiving waters or irretrievably losing essential water supplies. Further, expensive treatment plants would operate for only a few weeks or months because water is usually available for transfer only during snowmelt (50 percent of mountain stream flow occurs in just three months: May, June, and July).

As one example, the Bureau of Reclamation's C-BT Project, operated by Northern Water and described above, transfers water from the Colorado River and delivers it through a tunnel under the Continental Divide for municipal, agricultural, and other uses in northeastern Colorado. The C-BT Project diverts water from four source lakes, reservoirs, and streams and conveys that water by gravity and three pump stations through two tunnels and nine canals into and then out of at least 17 different natural streams and rivers that are integral parts of the water transfer. Transfers average 220 MGD and peak at 275 MGD, substantial but not unusually large water transfers in the West. Even assuming that the necessary infrastructure could be put in place to handle spring peaking flows, the potential capital cost to treat C-BT water even once could exceed $315 million, double the initial cost of the entire C-BT Project. Furthermore, the C-BT Project might have to

treat essentially the same water 17 times – at every point water is transferred to a lake, reservoir, or stream for downstream delivery. Such treatment would be prohibitively expensive. And, without the ability to treat peaking flows, the C-BT Project's water transfers would face an uncertain future.

Many water transfers, including the C-BT Project, traverse federal lands that include national parks and national forests adjacent to wilderness areas. Moreover, the removal of pollutants by a treatment plant produces a "sludge," which requires appropriate disposal. Given the location of many transfers within or near pristine areas, combined with the need for large sites for treatment facilities and sludge disposal, the NPDES approach may not be economically or technically feasible, politically acceptable, or environmentally desirable for many essential water transfers. Simply stated, the land use approvals necessary to build the treatment facilities and dispose of the waste may be impossible to obtain.

For these insurmountable practical and financial reasons, application of the NPDES program to water transfers could preclude such transfers altogether. In so doing, the NPDES program would supersede or abrogate state-allocated water rights, contrary to Congressional directives in the CWA. *See* 33 U.S.C. §§ 1251(b) and (g), 1370.

CONCLUSION

Nothing is more critical to the West and *Amici* than their continued ability to utilize scarce water resources when and where they are needed. As explained above, water supply in the West necessarily involves the collection, storage, and transfer of water through pipelines, tunnels, canals, and natural waterbodies. Extension of the NPDES program to such water transfers would "alter[ ] the established federal-state framework by permitting federal encroachment upon a traditional state power" without Congress conveying its purpose clearly. *SWANCC*, 531 U.S. at 173. Further, the NPDES program would supersede or abrogate state-allocated water rights contrary to Congress's directives in the CWA. 33 U.S.C. §§ 1251(b) and (g), 1370. Such water management activities must remain, as they always have been, a state prerogative to align available water supplies with essential needs.

For the forgoing reasons, *Amici Curiae* municipal water providers respectfully urge the Court to grant the Petitions for a Writ of *Certiorari*.

Respectfully submitted,

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SOUTH FLORIDA WATER MANAGEMENT DISTRICT, *et al.*

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THE CITY OF NEW YORK IN SUPPORT OF RESPONDENT SOUTH FLORIDA WATER MANAGEMENT DISTRICT

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INTEREST OF *AMICUS CURIAE*

The City of New York (the "City") submits this brief in support of Respondent South Florida Water Management District ("SFWMD").[1] The City, a political subdivision of the State of New York, owns and operates a water supply system that provides unfiltered drinking water of exceptional quality to over eight million City residents and an additional one million people in upstate communities. The system was designed, and has operated since its inception decades ago, to deliver water through the transfer of natural, untreated water through a series of reservoirs to its consumers. The transfers send the water from each reservoir to a reservoir in the system closer to the City. The City's ability to supply sufficient water through this system to fulfill demand is jeopardized by litigants who have repeatedly challenged a key transfer in the City's system in federal and State court litigation as well as in administrative proceedings.

The litigation concerns transfers of water from the Schoharie Reservoir to the Esopus Creek through the Shandaken Tunnel—transfers the City

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[1] In accordance with Supreme Court Rule 37.2(a), counsel of record for all parties have been given at least 10 days' notice of the City's intention to file this amicus curiae brief. The City, as a municipality, is authorized to file an amicus curiae brief pursuant to Supreme Court Rule 37.4.

has been making since 1924 and which constitute approximately 16 percent of the City's total water supply. The water at issue meets the stringent federal and State standards for unfiltered drinking water, but, nevertheless, as a result of this litigation, the City has paid over 5.2 million dollars in penalties for these transfers and hundreds of thousands of dollars for plaintiffs' attorneys' fees and costs, in addition to bearing its own expenses for past and inevitable future proceedings.

In a decision that cannot be reconciled with the Eleventh Circuit's decision at issue here, the Second Circuit and the Northern District of New York have required the City to apply for, and the State to make a determination concerning, a Clean Water Act ("CWA") National Pollutant Discharge Elimination System ("NPDES") permit[2] for the City's transfers through the Shandaken Tunnel. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41 (N.D.N.Y. 2003), *aff'd in relevant part*, 451 F.3d 77 (2d Cir. 2006), *cert. denied*, 549 U.S. 1252 (2007). Throughout this and related proceedings,[3] the City

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[2] In New York State, the NPDES permit program is administered by the New York State Department of Environmental Conservation ("NYSDEC") as the State Pollutant Discharge Elimination System ("SPDES") permit program. N.Y. ENVTL. CONSERV. LAW ("ECL") § 17-0801 (Consol. 2010).

[3] *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, No. 1:00 Civ. 511 (N.D.N.Y. Oct. 6, 2000);

has maintained that the NPDES program does not apply to transfers of untreated water. In 2008, EPA adopted the National Pollutant Discharge Elimination System Water Transfers Rule (the "Water Transfers Rule"), 40 C.F.R. § 122.3(i) (2010), stating that the NPDES program does not apply to such transfers, reflecting EPA's concurrence with the City's interpretation of the CWA.

As a result of the decisions in the *Catskill Mountains* litigation, however, the City was compelled to apply for a NPDES permit for the Shandaken Tunnel, which was granted in 2006. The *Catskill Mountains* plaintiffs challenged the Shandaken Tunnel permit in State court because it included a number of exemptions to the water quality-based effluent limits for temperature and turbidity. *See Catskills Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, No. 06-3601,

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Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 207 F. Supp. 2d 3 (N.D.N.Y. 2002); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 2008 U.S. Dist. LEXIS 45508, *27 (N.D.N.Y. 2008); *City of New York v. Catskill Mountains Chapter of Trout Unlimited, Inc.*, 549 U.S. 1252 (2007); *Catskills Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, No. 06-3601, 2008 N.Y. Misc. LEXIS 5923 at *5 (N.Y. Sup. Ct. Aug. 5, 2008); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan*, 71 A.D.3d 235, 240, 892 N.Y.S.2d 651, 655 (3d Dep't 2010).

2008 N.Y. Misc. LEXIS 5923 at *12-13 (N.Y. Sup. Ct. Aug 7, 2008). While these exemptions were included in the permit to promote a healthy aquatic environment and to protect the recreational uses of the Esopus,[4] plaintiffs argued, ultimately successfully, that the exemptions are not authorized under the CWA or the New York State Environmental Conservation Law. See *Catskills Mountains*, No. 06-3601, 2008 N.Y. Misc. LEXIS 5923 at *13. The City maintained that the permit was not required under the newly adopted Water Transfers Rule. The State courts refused to apply the Water Transfers Rule to the permit, despite the City's arguments based on extensive judicial precedent that intervening changes in applicable law should be applied under these circumstances. In connection with that litigation, the City was recently required to apply for modifications to the permit, which will inevitably lead to further administrative proceedings and, quite possibly, additional litigation.

The Eleventh Circuit's decision in the matter currently before the Supreme Court is favorable to the City in that it affirms EPA's Water Transfers Rule. The City nonetheless supports Petitioner SFWMD because the Eleventh Circuit did not find, as it should have, that the NPDES permitting

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[4] *New York City Dep't of Envtl. Prot.*, 2005 N.Y. ENV. LEXIS 40 at *62 (New York Dep't of Envtl. Conservation June 22, 2005) (ruling on issues and party status).

program is inapplicable to transfers of untreated water based on the language of the Clean Water Act itself.

Until the Supreme Court addresses this important issue directly, the City will continue to be subject to litigation concerning the transfers through the Shandaken Tunnel and, potentially, relating to the numerous other transfers that are made throughout its water supply system. All surface water supply systems involving more than a single source rely fundamentally on local governments' ability to move water from one source to another to meet local water supply needs. Without final resolution of this issue, the NPDES permitting scheme will be applied inconsistently to water transfers – depending in what circuit they are situated and on whether EPA reconsiders the Water Transfers Rule, as it has indicated it may do. Water managers will continue to be subject to litigation surrounding the need for permits and the content of the permits themselves. The City's protracted litigation concerning the Shandaken Tunnel is described in more detail below.

SUMMARY OF THE ARGUMENT

The City's water supply system relies upon a series of transfers of natural, untreated water from upstate reservoirs through aqueducts and tunnels to downstate reservoirs. Over the past ten years, the City has expended tremendous resources in

litigation defending one particular transfer that brings water toward the City from the Schoharie Reservoir through the Shandaken Tunnel into the Esopus Creek, the main tributary of the City's Ashokan Reservoir. The proceedings stemming from the original federal litigation are ongoing.

After the Second Circuit held that the City must obtain a permit for the transfer, the City sought and obtained the Shandaken Tunnel SPDES Permit. That permit was, however, subject to prolonged administrative proceedings, and was subsequently held invalid in a State court challenge. Pursuant to the State court decision, the City was required to apply to modify the Shandaken Tunnel SPDES Permit. The City's application, submitted on October 13, 2010, will itself be subject to extensive proceedings, with no guarantee that the City will be able to obtain a permit that allows for operation of the Tunnel in accordance with all applicable laws and prudent water supply management practices and at the same time satisfy the litigants who initially brought the Clean Water Act litigation.

There is currently a split between the Eleventh and the Second Circuit Courts of Appeals regarding the applicability of the NPDES program to interbasin water transfers of untreated water. The City has long believed, as EPA has consistently maintained, that these water transfers do not require NPDES permits. The current uncertainty

and ongoing litigation has hampered the City's ability to plan for its water supply needs. If the issue remains unresolved, the City will be subject to additional years of litigation regarding the transfers made at the Shandaken Tunnel as well as potential litigation concerning numerous other water transfers in the City's water supply system. The Supreme Court should resolve this important issue to put to rest the litigation and uncertainty facing the City as well as other municipalities and water management agencies throughout the nation.

ARGUMENT

I

FOR DECADES, THE CITY'S WATER SUPPLY SYSTEM HAS RELIED UPON INTERBASIN TRANSFERS OF UNTREATED WATER.

The City owns and operates a water supply system in upstate New York that supplies high quality drinking water to nearly half the population of the State. The aqueducts and tunnels in the system transfer water from various reservoirs to other reservoirs or water bodies within the system, moving the water down to the City for consumption by over eight million City residents and an additional one million people in four upstate counties. The City's average demand for water is approximately one billion gallons per

day. Many of the City's reservoirs, tunnels, and aqueducts have been providing New Yorkers with water for a century or more. *See generally Catskill Mountains,* 244 F. Supp. 2d at 46.

The City's upstate water supply system includes the Catskill, the Delaware, and the Croton water supply systems. The Catskill watershed, which provides approximately 40% of the City's drinking water, has two reservoirs: the Ashokan and the Schoharie. Water from the Schoharie Reservoir is diverted through the Shandaken Tunnel to the Esopus Creek, the main tributary to the Ashokan Reservoir. The Ashokan Reservoir has been in service since 1915, and the Shandaken Tunnel has been in service since 1924. *See generally id.*

II

LITIGATION CONCERNING THE CITY'S TRANSFER OF WATER THROUGH THE SHANDAKEN TUNNEL HAS PERSISTED FOR THE PAST TEN YEARS.

The City does not add anything to the water collected in the Schoharie Reservoir before diverting it through the Shandaken Tunnel. The mountains surrounding the Schoharie Reservoir, however, are characterized by extensive deposits of silts and glacial clays, which are often exposed by

erosion, particularly during storms. As a result, water in the Schoharie Reservoir released from the Tunnel regularly contains elevated levels of naturally occurring suspended solids, and thus turbidity. *See id.* at 46-47. On March 31, 2000, environmental groups and sportfishing organizations initiated a Clean Water Act citizen suit against the City in the United States District Court for the Northern District of New York, alleging that the transfers, which can cause an elevation in the turbidity of the Esopus, a world-class trout fishery, violate the Clean Water Act.

A. Regulation of Shandaken Tunnel Diversions Prior to the Litigation

Prior to the *Catskill Mountains* litigation, neither EPA nor NYSDEC sought to regulate the turbidity in the Tunnel diversions under the Clean Water Act or the corresponding provisions in the New York State Environmental Conservation Law ("ECL"), or interpreted those laws to govern the Tunnel diversions.

The diversions have, however, long been regulated under both federal and State law. Since the early 1990s, the City has been required to analyze and address turbidity in the Tunnel diversions under a series of Filtration Avoidance Determinations issued pursuant to the Surface Water Treatment Rule and the federal Safe Drinking Water Act. *See* 42 U.S.C. 300g (2010); 40

C.F.R. §§ 141.71-141.75 (2010). In addition, since 1977, NYSDEC has regulated the Tunnel diversions to control the flow and temperature of the Esopus, thereby supporting a healthy aquatic habitat for trout and promoting recreational uses such as fishing and kayaking. *See* ECL § 15-0801(2) (Consol. 2010); N.Y. COMP. CODES R. & REGS. tit. 6, §§ 670.1-670.9 (2010).

B. The *Catskill Mountains* Clean Water Act Citizen Suit

On October 4, 2000, the Northern District of New York dismissed the citizen suit, holding that transfers of untreated water do not involve a discharge of pollutants for purposes of the Clean Water Act. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, No. 1:00 Civ. 511 (N.D.N.Y. Oct. 6, 2000). Following plaintiffs' appeal, the Second Circuit reversed and remanded. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001). On June 4, 2002, the Northern District granted plaintiffs' motion for partial summary judgment on the sole question of the City's liability under the Clean Water Act. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, No. 1:00 Civ. 511 (N.D.N.Y. June 4, 2002).

Following a trial on the amount of penalties and the appropriate remedy, the Northern District issued an order, dated February 6, 2003, which

held the City liable for statutory penalties of $5,749,000.[5] *Catskill Mountains*, 244 F. Supp. 2d at 54, 56. Those penalties, for operating a water supply facility as it had been operated for nearly eighty years, including for over thirty years after the adoption of the Clean Water Act, were at the time believed to be the largest Clean Water Act penalties ever assessed against a municipality.[6]

In the February 2003 Order, as modified by an order dated March 12 2003, the Northern District also made respondent NYSDEC a third-party defendant pursuant to the All Writs Act and directed NYSDEC to make a determination concerning the New York City Department of Environmental Protection's ("DEP") application for a SPDES permit for the Shandaken Tunnel within 18 months. *Catskill Mountains*, 244 F. Supp. 2d at 55.

Approximately one week after EPA proposed the Water Transfers Rule, the Second Circuit issued a decision affirming in part and remanding for recalculation of penalties. *Catskill Mountains*,

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[5] On remand, the District Court recalculated the penalty amount to be $5,225,000. *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, No. 1:00 Civ. 511 (N.D.N.Y. Oct. 23, 2003).

[6] *City Ordered to Pay $6 Million Penalty for Polluting Water: But Discharge at Esopus Creek Could Have Cost 10 Times More*, 229 N.Y.L.J. 1 (2003).

451 F.3d 77. In affirming the Northern District's imposition of CWA penalties and requiring DEP to obtain a permit for the Tunnel, the Second Circuit did not refer to EPA's Notice of Proposed Rulemaking at all, referring instead to an interpretive memorandum upon which the Water Transfers Rule was based that was released by the EPA in 2005. *Catskill Mountains*, 451 F.3d at 82; Memorandum from Ann R. Klee, Gen. Counsel, & Benjamin H. Grumbles, *Assistant Adm'r for Water, EPA*, Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers (Aug. 5, 2005) *available at* http://www.epa.gov/ogc/documents/water_transfers.pdf. The Second Circuit noted that the memorandum was entitled to *Skidmore*, rather than *Chevron*, deference. *Catskill Mountains.*, 451 F.3d at 82 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), and *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001)).

The Second Circuit denied the City's petition for rehearing and rehearing en banc. The City unsuccessfully petitioned the Supreme Court for a Writ or Certiorari. *City of New York v. Catskill Mountains Chapter of Trout Unlimited, Inc.*, 549 U.S. 1252 (2007).

C. The City's Challenges in Obtaining a SPDES Permit for the Shandaken Tunnel Diversions

CWA permits must include effluent limits to "achieve water quality standards . . . including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1) (2010). The State water quality standard for discharges of turbid waters in New York is: "[n]o increase that will cause a substantial visible contrast to natural conditions." N.Y. COMP. CODES R. & REGS. tit. 6, § 703.2 (2003). NPDES permits were designed for discharges of wastewater, and are not compatible with diversions of natural, untreated water such as the flows through the Shandaken Tunnel. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982) ("[t]hroughout its consideration of the Act, Congress' focus was on traditional industrial and municipal wastes; it never considered how to regulate facilities such as dams which indirectly cause pollutants to enter navigable upstream water and then convey these polluted waters downstream").

On December 31, 2002, while the litigation described above continued, DEP applied to NYSDEC for a SPDES permit for the Shandaken Tunnel, although it made clear in its application that it did not believe that such a permit was in fact required or authorized under the CWA. Upon information and belief, NYSDEC does not require,

maintain, administer or enforce a SPDES permit for any other transfer of untreated water that is made without any intervening industrial, municipal, or commercial uses. NYSDEC acknowledged that no model existed for a water transfer SPDES permit. NYSDEC issued a draft permit. Plaintiffs from the citizen suit petitioned NYSDEC for adjudication. Hearings, during which the City put forth extensive testimony from expert witnesses, were held in 2005. On July 27, 2006, the NYSDEC Commissioner issued a decision upholding the draft permit.

On September 1, 2006, NYSDEC issued the permit for the Shandaken Tunnel's outlet, SPDES Number NY-026-8151 (the "Shandaken SPDES Permit"). The permit established a maximum allowable turbidity difference between the discharges from the Shandaken Tunnel and the Esopus Creek downstream, an absolute upper limit for turbidity, a temperature limit for May through September, a year-round minimum flow, and a maximum flow from June through October. NYSDEC included in the permit a number of exemptions to the temperature, turbidity, and flow regimes. These exemptions were included to address circumstances where transfers are vital to the public water supply or are required under State regulations to promote a healthy aquatic

environment in, and recreational use of, the Esopus.[7]

In its 2006 decision, the Second Circuit found, pointing to the exemptions allowed in the draft Shandaken SPDES Permit as evidence, that there is "flexibility built into the CWA and the NPDES permit scheme . . . [that] will allow federal authority over quality regulation and state authority over quantity allocation to coexist without materially impairing either." *Catskill Mountains*, 451 F.3d at 85. Several months later, however, the *Catskill Mountains* plaintiffs challenged precisely those elements of the Shandaken SPDES Permit in State court. *Catskills Mountains*, No. 06-3601, 2008 N.Y. Misc. LEXIS 5923 at *5.

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[7] NYSDEC is charged with regulating the "volume and rate of change of volume of releases" from reservoirs "to protect and enhance the recreational use of waters affected by such releases," and has accordingly promulgated rules and regulations for releases from the Shandaken Tunnel into the Esopus Creek. ECL § 15-0801(2); N.Y. COMP. CODES R. & REGS. tit. 6, §§ 670.1-670.9 (2010). For example, the City is required to divert sufficient volume through the Shandaken Tunnel to meet a combined minimum flow of 160 million gallons per day in the Esopus Creek downstream of the Shandaken Tunnel portal. N.Y. COMP. CODES R. & REGS. tit. 6, §§ 670.3(a).

D. Litigation Concerning the SPDES Permit Issued by NYSDEC and the Refusal of the New York State Courts to Apply EPA's Water Transfer Rule Because of the Second Circuit's Ruling

Based on extensive research and analysis, the City believes that no matter what reasonable structural and programmatic measures are implemented, the diversions through the Shandaken Tunnel will continue, on a regular basis, to be visibly more turbid than the receiving water, the Esopus Creek. The turbidity derives from the geology and topography of the Schoharie watershed, therefore it is doubtful that the untreated waters coming from the reservoir and through the Tunnel will ever consistently meet the State's narrative criteria when applied to the receiving waters of the Esopus Creek. *See generally id.* at *14-15. The City often needs to make releases through the Shandaken Tunnel notwithstanding naturally occurring elevated turbidity levels that cause a "substantial visible contrast" with the waters in the Esopus Creek. For example, releases may be necessary to address or prevent a drought, or to facilitate repairs of parts of the system such as dams and aqueducts. As noted above, the City is also required, under State law, to release water in specified amounts and at specified times, in order, among other things, to protect the ecosystem and advance the recreational use of the Esopus Creek. *See* ECL § 15-0801(2) (Consol.

2010); N.Y. COMP. CODES R. & REGS. tit. 6, §§ 670.1-670.9 (2010).On September 26, 2006, plaintiffs in the *Catskill Mountains* litigation initiated a proceeding in the New York State Supreme Court, Ulster County, challenging the Shandaken SPDES Permit. They claimed that the CWA mandates strict adherence to state water quality standards at all times, and does not allow for the exemptions provided in the permit.

The Water Transfers Rule was issued after the parties had submitted briefs in the State court proceeding, but before a decision was issued. *See* Water Transfers Rule, 73 Fed. Reg. 33,697 (June 13, 2008), now codified at 40 C.F.R. § 122.3(i). On July 25, 2008, the City moved to amend its answer asking the State Supreme Court to dismiss petitioners' claims as moot and to find the Shandaken SPDES Permit null and void in light of the new regulation. The State Supreme Court denied the City's motion, finding that it could not consider the Water Transfers Rule because the Shandaken SPDES Permit was issued in compliance with a federal injunction. *Catskills Mountains*, No. 06-3601, 2008 N.Y. Misc. LEXIS 5923 at *6-7. The State Supreme Court explained that it was "without authority to suspend, limit or vacate the previously issued federal injunction" and that "[t]o do so would flout the Supremacy Clause of the United States Constitution and simultaneously denigrate time-honored concepts of judicial comity." *Id.* at *7. The court further

recommended that the City, if it wished to pursue the matter, bring before the federal courts the question of whether the Water Transfers Rule renders a SPDES permit for the Shandaken Tunnel unnecessary. *Id.*

In addition to denying the City's motion, the Supreme Court granted the petition and (1) vacated NYSDEC's determination to issue the Shandaken SPDES Permit, and (2) ordered the City to apply, within 120 days, for variances from the effluent and temperature limitations from which NYSDEC had allowed exemptions. *Catskills Mountains*, No. 06-3601, 2008 N.Y. Misc. LEXIS 5923 at *18-19. The Shandaken SPDES Permit remains in force pending NYSDEC's issuance of an amended final permit. *Id.*

The City appealed from the decision, thereby staying the 120 days that it had to apply for the variances. N.Y. C.P.L.R. § 5519(a) (Consol. 2010). In January 2010, the New York State Appellate Division, Third Department, affirmed the Supreme Court's decision, *finding that the "Supreme Court was without authority to alter or modify the federal court requirement that the City obtain a SPDES permit." Catskill Mountains Chapter of Trout Unlimited, Inc. v. Sheehan, 892 N.Y.S.2d 651, 655 (N.Y. App. Div. 2010).* The City's motions for leave to appeal to the New York State Court of Appeals were subsequently denied.

Pursuant to the August 2008 Order, the City submitted an application for variances to NYSDEC on October 13, 2010. Based on communications with opposing counsel, the City fully anticipates that the same plaintiffs will challenge both the application and the variances, if they are ultimately issued.

If the variances are not granted, or if they are successfully challenged, the SPDES permit for the Shandaken Tunnel will prohibit the City from diverting much-needed water when the water exceeds water quality standards for turbidity or temperature. Even if the variances are granted and survive plaintiffs' challenges, those variances may be shorter in duration than the actual permit and will require that "reasonable progress be made toward achieving the effluent limitation." *N.Y. Comp. Codes R. & Regs. tit.* 6, § 702.17(e)(2) (2010). *Consequently, even if the City is able to comply with the SPDES permit initially, it may find itself in violation as time goes on if it fails to make "reasonable" progress towards achieving the State water quality standard for turbidity – a likely scenario given the City's conclusion that, due to natural conditions, it will never be able to consistently ensure that the diversion has no substantial visible contrast to the receiving waters.*

III

THE SECOND CIRCUIT'S RULING REGARDING THE APPLICABILITY OF THE NPDES PERMITTING PROGRAM TO INTERBASIN WATER TRANSFERS IS AT ODDS WITH THE ELEVENTH CIRCUIT'S RULING AND EPA'S INTERPRETATION.

The Second Circuit decision under which the City was required to obtain a SPDES permit for its transfers of water through the Shandaken Tunnel directly conflicts with the Eleventh Circuit's decision that no permit is needed for the transfers of water that the SFWMD makes from agricultural canals into Lake Okeechobee. See *Catskill Mountains, 451 F.3d 77; Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 570 F.3d 1210 (11th Cir. 2009). The Second Circuit found that under the plain language of the Clean Water Act, the transfers that occur through the Shandaken Tunnel constitute the "addition" of pollutants, or the "introduction [of pollutants] into navigable waters from the 'outside world,' " and therefore require a NPDES permit. Catskill Mountains, 451 F.3d at 81, 84. The Eleventh Circuit found that the statute is ambiguous, that the Water Transfers Rule was entitled to Chevron deference and that, therefore, no*

NPDES permit is required for the transfer of a pollutant from one navigable body of water to another. Friends of the Everglades, 570 F.3d at 1227-28.

As a result of the differing conclusions reached by the Second and Eleventh Circuits, transfers of water made into water bodies within the Eleventh Circuit will not require NPDES permits, whereas interbasin transfers made into water bodies within the Second Circuit will. It should be noted that the Water Transfers Rule has been challenged in several different circuit and district courts. While the circuit court challenges were all consolidated into the Eleventh Circuit, a decision by the Eleventh Circuit will not be binding on the other circuits. *See, e.g., Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. EPA,* 630 F. Supp. 2d. 295, 305 (S.D.N.Y. 2009) (granting motion to stay challenge to Water Transfers Rule pending Eleventh Circuit's decision).

Given the conflicting applications of a federal statute by the Circuit Courts of Appeals, the Supreme Court should grant a writ of certiorari to resolve this important issue. Absent a resolution by this Court, the City and other water managers are faced with continuing litigation surrounding this issue and uncertainty in planning for water supply and other water management needs.

CONCLUSION

For the reasons discussed above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In The Supreme Court of the United States

FRIENDS OF THE EVERGLADES, *et al.*,

Petitioners,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, *et al.*,

Respondents.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, *et al.*,

Respondents.

On Petitions For A Writ Of *Certiorari* To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF *AMICI CURIAE* THE STATES OF COLORADO, ALASKA, CALIFORNIA, FLORIDA, IDAHO, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, SOUTH DAKOTA, TEXAS, UTAH AND WYOMING IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

States depend upon thousands of water transfers to move billions of gallons of water every day to meet the vital water supply needs of their residents. The Eleventh Circuit's decision with regard to the U.S. Environmental Protection Agency's Water Transfers Rule, however, has created substantial uncertainty regarding the regulation of such essential water transfers under the Clean Water Act. The question the Court should address is:

> Whether the lower court erred in failing to apply the "clear statement rule," which requires a clear and manifest statement from Congress to authorize an unprecedented intrusion into traditional State authority, thus allowing federal encroachment upon State water law and interference with interstate compacts, Congressional acts, and the Supreme Court's water apportionments.

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I. INTEREST OF *AMICI CURIAE*

The Attorneys General of the States of Colorado, Alaska, California, Florida, Idaho, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, Texas, Utah and Wyoming ("*Amici* States") submit this brief as *Amici Curiae* pursuant to RULE 37.4 of this Court in support of the position of Respondents South Florida Water Management District, *et al.*, that the Court should grant the Petitions for a Writ of *Certiorari* to review *Friends of the Everglades v. South Florida Water Management District*, 570 F.3d 1210 (11th Cir. 2009), *reh'g denied en banc*, 605 F.3d 962 (11th Cir. 2010).[1]

Amici States strongly believe that the lower court's decision conflicts with the basic tenet of constitutional law that courts may not "alter[ ] the established federal-state framework by permitting federal encroachment upon a traditional state power . . . '[u]nless Congress conveys its purpose clearly.'" *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs* (*SWANCC*), 531 U.S. 159, 173 (2001) (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)). Despite the lack of "a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority" in the Clean Water Act ("CWA"), *Rapanos v. United States*, 547 U.S. 715, 738 (2006), the Eleventh

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[1] Counsel of record for all parties received timely notice of the *Amici Curiae's* intent to file this brief pursuant to RULE 37.2(a).

Circuit's ruling leaves the door open for the U.S. Environmental Protection Agency ("EPA") to impose permitting requirements on water transfers, threatening federal encroachment on the States' authority to allocate their water resources. *Friends of the Everglades*, 570 F.3d at 1227-28. No court has addressed the issue *Amici* States raise here: the relationship between the established federal-state framework of deference to State water law, the federalism principles at the heart of the CWA, and Congress's statements of intent in the CWA.

Using individual water allocations granted pursuant to State water law, countless public and private entities in the United States divert water from natural streams and lakes. Many then transfer water through man-made tunnels, canals, and pipelines into other natural streams and lakes to meet essential water needs of residents in other watersheds. Water transfers may be as simple as the diversion of water from a river into an adjacent (but hydrologically separate) stream for irrigation of a nearby field, or as complex as the interstate San Juan-Chama Project, which transfers water across the Continental Divide and across the Colorado-New Mexico state line. In the Upper Colorado River Basin alone, there are at least thirty-six major water transfers that move approximately 229 billion gallons of water per year from the basin of origin for use in another basin, often in another State.

The western part of the United States is generally arid; that is, western lands receive less than the thirty inches of annual precipitation necessary to

sustain non-irrigated agriculture. Because most precipitation in the West falls as snow, water must be captured when and where the snow melts in remote areas far from the major urban and agricultural centers that need the water. Hence, it is necessary to transfer water through complex systems of man-made and natural conveyances and reservoirs to places of need and use. These water transfers allow the West to sustain its cities, farms, and ranches. Without this elaborate system of water transfers, many nationally important agricultural regions could not grow crops, including the Central and Imperial Valleys of California, Weld and Larimer Counties in Colorado, and the Snake River Basin of Idaho. Similarly, many of the West's great cities could not exist, including Albuquerque, Cheyenne, Colorado Springs, Denver, Los Angeles, Las Vegas, Phoenix, Reno, Salt Lake City, San Diego, San Francisco, Santa Fe, Seattle, and Tucson.

Water supply crises and issues are not unique to the arid West. Eastern States recently suffered from what the National Weather Service has characterized as the worst drought in more than a century, leaving them with dangerously low supplies of water. Consequently, a number of these States will become ever more reliant upon water transfers to meet the existing and increasing water needs of burgeoning populations in certain large cities and metropolitan areas. For example, Virginia Beach is wholly dependent upon an interbasin water transfer from Lake Gaston,

situated along the border of North Carolina and Virginia, as its primary water supply. Similarly, the Greenville water transfer, the largest transfer in South Carolina, conveys water from the Savannah River.

In short, the ability to divert, transport, store, and use water is critical to the social and economic well-being of the United States, particularly the arid West.

II. REASONS FOR GRANTING *CERTIORARI*

There are three principal reasons this Court should grant the Petition. First, the Eleventh Circuit's decision conflicts with decisions of other circuits, thus creating uncertainty regarding the regulation of water transfers under the CWA. Second, the Circuit failed to apply the "clear statement rule," which requires a clear and manifest statement from Congress to authorize an unprecedented intrusion into traditional State authority. The lower court's error would authorize federal encroachment on State water law – contrary to the plain language of the CWA, as also recognized by this Court in other decisions involving the Act. Third, authorizing EPA to require National Pollutant Discharge Elimination System ("NPDES") permits for water transfers would empower EPA to interfere with interstate compacts, Congressional acts, and the Supreme Court's water apportionments.

III. ARGUMENT

A. The Court Should Grant *Certiorari* to Resolve a Conflict Among the Circuits and to Ensure Nationwide Uniformity in Federal Regulation of Water Transfers.

For many years, States have faced increasing uncertainty caused by litigation over the applicability of the CWA permitting requirements to water transfers. The First and Second Circuits have held that the plain language of the CWA requires NPDES permits for water transfers. *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1299 (1st Cir. 1996); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 84 (2d Cir. 2006).[2] The *Catskill* court also rejected deference to EPA's interpretation of the CWA. 451 F.3d at 83 n.5. In contrast, the Eleventh Circuit held that the CWA is ambiguous with regard to NPDES permitting of water transfers, and deferred to EPA. *Friends of the Everglades*, 570 F.3d at 1227-28.

As a result, NPDES permits are currently required for water transfers in the Second Circuit, but not required in the rest of the nation pursuant to the decision below and EPA's Water Transfers Rule ("Rule"). Moreover, the Rule itself is subject to

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[2] *Amici* States distinguish the discharge of produced waters from coal bed methane ("CBM") from water transfers that are at issue in this case. *See, e.g., N. Great Plains Res. Council v. Fid. Exploration & Dev. Co.*, 325 F.3d 1155, 1163 (9th Cir. 2003) ("CBM water is a pollutant pursuant to the CWA.").

numerous challenges, coincidentally consolidated in the Eleventh Circuit. *Friends of the Everglades v. U.S. Envtl. Prot. Agency*, 08-13652-CC (11th Cir.) (consolidated with 08-13653-CC, 08-13657-CC, 08-14247-CC, 08-14471-CC, 08-14921-CC, 08-16270-CC, 08-16283-CC, 08-17189-CC, and 09-10506-CC). The consolidated litigation is stayed pending resolution of this appeal.[3] Order (Nov. 14, 2008), *id.* The *Amici* States firmly believe this question of the applicability of the CWA's permitting requirements to water transfers inevitably leads to this Court. *Amici* States therefore believe the Court should grant *certiorari* to resolve the continuing uncertainty in the interests of judicial efficiency and economy and to end this costly and burdensome litigation. Moreover, *Amici* States require certainty to plan and execute necessary water supply projects to meet the essential needs of their residents.

B. The Court Should Grant *Certiorari* to Address Application of the Clear Statement Rule to the Clean Water Act in Accordance With the Established Federal-State Framework of Deference to State Water Law.

The Eleventh Circuit employed a *Chevron* analysis to rule that the CWA is ambiguous with regard to

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[3] Adding to the uncertainty, EPA is reconsidering its Water Transfers Rule, which currently provides that NPDES permits are not required for water transfers. Resp. of U.S. to Pet. for Reh'g at 15, *Friends of the Everglades*, 605 F.3d at 962.

whether the NPDES permitting program applies to water transfers and then deferred to EPA's current rule exempting water transfers from the program. *Friends of the Everglades*, 570 F.3d at 1227-28 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). In doing so, the Eleventh Circuit failed to insist on a clear and manifest statement from Congress authorizing an unprecedented intrusion into an area of traditional State authority – State water law. *See Rapanos*, 547 U.S. at 738. This is error as the CWA lacks a clear statement of Congressional intent to "alter[ ] the federal-state framework by permitting federal encroachment upon a traditional state power." *SWANCC*, 531 U.S. at 173. Quite the contrary, Congress expressed its clear intent to defer to State water law and specific State water allocations in the plain language of the CWA, an intent confirmed by the Act's legislative history. *See* 33 U.S.C. §§ 1251(b) and (g), 1370 (2010).

1. Congress Expressly Preserved the Established Federal-State Framework of Deference to State Water Law in the Text of the Clean Water Act.

As long understood and applied by the federal and State governments alike, land and water uses are traditionally and primarily State prerogatives. *SWANCC*, 531 U.S. at 174. The Supreme Court and

Congress have spoken with clear and consistent voices regarding deference to State water law.[4] For example, after Congress's 1972 adoption of the CWA and 1977 amendments, discussed below, the Supreme Court observed in *California v. United States*:

> The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.

438 U.S. 645, 653 (1978).

Unless Congress has expressed a clear intent for federal regulation in an area of traditional State authority – the "clear statement rule" – the Supreme Court has long and repeatedly warned against statutory interpretations that

> alter the federal-state framework by permitting federal encroachment upon a traditional state power. Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance. Thus, where an otherwise acceptable

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[4] Federal deference to State water law rests on the "equal footing" doctrine. Pursuant to that doctrine, Congress granted the States, upon their admission into the Union, sovereignty over the unappropriated waters in their streams. *See Fox River Paper Co. v. R.R. Comm'n of Wisc.*, 274 U.S. 651, 655 (1927); *Kansas v. Colorado*, 206 U.S. 46, 94 (1907).

> construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.

SWANCC, 531 U.S. at 173 (citations omitted). *See also*, *Rapanos*, 547 U.S. at 738 (2006) ("We ordinarily expect a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority."); *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991); *Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935).

Congress expressed its clear intent in the CWA to preserve, rather than alter, the established federal-state framework through purposeful and continued deference to State water law. 33 U.S.C. §§ 1251(b) and (g), 1370. In 1972, Congress incorporated its long-standing deference to State water law in § 510 of the CWA, stating, "[e]xcept as expressly provided in this chapter, nothing in this chapter shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C. § 1370. At that time, Congress also expressed in § 101(b) a general policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use (including restoration, preservation, and enhancement) of

land and water resources. . . ." 33 U.S.C. § 1251(b). Congress recognized that water and land use are inextricably intertwined. In adopting the CWA, Congress clearly intended that primary authority over such matters would continue to rest with the States.[5]

In the 1977 amendments to the CWA, Congress took the opportunity to reiterate and clarify its intent with respect to State authority over water quantity issues:

> It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to

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[5] States can and do implement suitable controls that balance water supply and water quality considerations under State water law, authority explicitly recognized by the Act. 33 U.S.C. § 1370. For example, in California, water transfers are regulated under water allocation laws that may impose requirements to protect water quality, *e.g.*, CAL. WATER CODE §§ 1257, 1258 (2010), and under State water quality law, CAL. WATER CODE § 13000, *et seq.* (2010). In Colorado, the State Water Quality Control Commission is authorized to adopt "control regulations" for activities that cause the quality of any State waters to be in violation of any applicable water quality standard. COLO. REV. STAT. § 25-8-205(1)(c) (2010).

> develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

33 U.S.C. § 1251(g). Thus, Congress mandated not only deference to the States' water laws, but also respect for individual water rights determined pursuant to the States' water laws. To the extent water quality concerns arise in the context of water allocations, the CWA requires the federal government to cooperate with – not mandate – the States to develop comprehensive solutions. *Id.*

Notably, the 1977 amendments strengthened language adopted just five years earlier in §§ 101(b) and 510 that recognized federal deference to the States in the matter of State control over water quantity issues. Thus, over time, Congress reiterated and reinforced federal deference to State water law and water allocations.

In sum, the Eleventh Circuit adopted a construction of the CWA that would authorize EPA to "alter[ ] the federal-state framework by permitting federal encroachment upon a traditional state power[,] . . . plainly contrary to the intent of Congress." *See SWANCC*, 531 U.S. at 173.

2. This Court has Repeatedly Acknowledged the Central Role of the States in Water Allocation and Pollution Control Matters.

In *South Florida Water Management District v. Miccosukee Tribe of Indians,* this Court acknowledged

the potentially far-reaching effects of requiring NPDES permits for water transfers:

> If we read the [Clean Water] Act to require an NPDES permit for every engineered diversion of one navigable water into another, thousands of new permits might have to be issued, particularly by western States, whose water supply networks often rely on engineered transfers among various natural water bodies. See Brief for Colorado *et al.* as *Amici Curiae* 2-4. Many of those diversions might also require expensive treatment to meet water quality criteria. It may be that construing the NPDES program to cover such transfers would therefore raise the costs of water distribution prohibitively, and violate Congress' specific instruction that "the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired" by the Act.

541 U.S. 95, 108 (2004). The Eleventh Circuit's construction of the the CWA is counter to this Court's express concerns about "the authority of each State to allocate quantities of water within its jurisdiction." This divergence highlights the importance of this issue for the nation.

The Eleventh Circuit's decision is also at odds with this Court's decision in *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994), a decision reinforced by *S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006). In

those cases, this Court affirmed the authority of States to impose State – not federal – water pollution controls on water allocations. Contrary to this established precedent, the decision below authorizes EPA to impose federal pollution controls on State water allocations.

In *PUD No. 1*, the State of Washington issued a § 401 water quality certification imposing a variety of condition. on a hydroelectric project, including a minimum stream flow requirement. 511 U.S. at 709. Similarly, in *S.D. Warren*, the State of Maine issued certifications that required Warren to maintain a minimum stream flow in the bypassed portions of the river and to allow passage for migratory fish and eels. 547 U.S. at 375. As in *PUD No. 1*, the Supreme Court in *S.D. Warren* recognized that "[s]tate certifications under § 401 are essential in the scheme to preserve State authority to address the broad range of pollution." 547 U.S. at 386.

The Supreme Court also recognized that State imposition of water pollution controls under § 401 on State water allocations is entirely consistent with Congress's mandate in § 101(g) of the CWA, which expressly preserves "the authority of each State to allocate quantities of water within its jurisdiction." *PUD No. 1*, 511 U.S. at 720. In these instances, the States have been free to impose appropriate controls and conditions on water transfers that balance water supply and water quality considerations under State water law.

C. The Court Should Grant *Certiorari* to Prevent Interference With Interstate Compacts, Congressional Acts, and the Supreme Court's Water Apportionments.

Authorizing EPA to expand the NPDES program to include water transfers may interfere with the States' ability to use their full legal entitlement to scarce water under interstate compacts, Congressional acts, and the Supreme Court's water apportionments. If NPDES program requirements raise the costs of water distribution prohibitively, as this Court postulated in *Miccosukee*, States may not be able to transfer legally available water from one basin to another to meet their in-state demands – and their interstate obligations.

A significant number of water transfers occur on interstate stream systems, waters allocated among the States by interstate compact, Supreme Court decree, or Congressional act.[6] States may not be able to use their full legal entitlement to scarce water if they cannot transfer legally available water from one basin to another to meet demands. For example, Colorado uses portions of its Colorado River Compact entitlement to meet needs in the South Platte River and Arkansas River Basins. These basins lack

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[6] *See, e.g.*, Colorado River Compact, H. Con. Res. 6877, 67th Cong., 42 Stat. 171 (1921) (Ariz., Cal., Colo., Nev., N.M., Utah, Wyo.); *Colorado v. New Mexico*, 459 U.S. 176 (1982); Boulder Canyon Project Act, 43 U.S.C. § 617 (2010) (allocating the lower Colorado River among Arizona, California, and Nevada).

adequate native water to meet both Colorado's needs and its Compact delivery obligations to downstream States. Similarly, New Mexico relies on water transferred by the San Juan-Chama Project from Colorado to receive its full entitlement to water under the Upper Colorado River Compact, S. Con. Res. 790, 81st Cong., 63 Stat. 31 (1949). New Mexico, in turn, uses this Colorado River Basin water to satisfy needs in the Rio Grande Basin, which often lacks sufficient water supplies, thus ensuring that the State has adequate native water to meet its delivery obligations to Texas under the Rio Grande Compact, H. Con. Res. 4997, 76th Cong., 53 Stat. 785 (1939).

Altering the federal-state framework would improperly override such interstate allocations, without a clear and manifest statement from Congress that it intended to do so.

CONCLUSION

For the foregoing reasons, the Court should grant the Petitions for a Writ of *Certiorari*.

Respectfully submitted,

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And

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THE FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES, *AMICUS CURIAE*, IN SUPPORT OF RESPONDENT, SOUTH FLORIDA WATER MANAGEMENT DISTRICT

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INTEREST OF *AMICUS CURIAE*[1]

The Florida Department of Agriculture and Consumer Services ("DACS") under § 20.14(1), Fla. Stat. (2010), is statutorily charged with the duty to "protect the agricultural and horticultural interests of the state" under § 570.07(13), Fla. Stat. (2010).[2]

The Florida Legislature has declared the production of agricultural commodities in this state to be a "large and basic industry that is important to the health and welfare of the people and to the economy of the state." § 604.001(2), Fla. Stat. (2010). The Legislature has further declared that it is important "that additional problems are not created for growers and ranchers engaged in the Florida agricultural industry by laws and regulations that cause, or tend to cause, agricultural production to become inefficient or unprofitable." § 604.001(5), Fla. Stat. (2010). Finally, under §§ 570.074-.075, Fla. Stat. (2010), the DACS has an Office of Agricultural Water Policy ("OAWP") which was created for the purpose of engaging in any matter "relating to water

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[1] Counsel for *amicus curiae* has authored this brief in whole and no other person or entity other than *amicus*, have made a monetary contribution to the preparation or submission of the brief. The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief, and those consents have been submitted to the Clerk of the Court.

[2] The head of DACS is the Commissioner of Agriculture who, pursuant to Art. IV, § 4(f) of the Florida Constitution supervises all matters pertaining to agriculture in the state.

policy affecting agriculture, application of such policies, and coordination of such matters with state and federal agencies." Agriculture is a vital part of Florida's heritage, economic foundation, and potential. Florida has more than 47,000 farms, which grow more than 280 different crops on a commercial scale with a total production value of over $7.7 billion. Agriculture's impact on Florida's economy is vast, accounting for an annual total economic impact of nearly $100 billion, and the industry supports approximately 767,000 jobs throughout the state.

The DACS's participation in this matter flows from its statutory duty to protect Florida agricultural food products and the interests of all Florida citizens involved in or affected by issues impacting the continued viability of agricultural operations in the state. DACS has a direct interest in the outcome of this case. Historically, and through the present, Florida agriculture has relied on water management systems to control water on agricultural lands. The vast majority of these systems include structures that can hold back, release or divert water. The specific interest of DACS in this case is to ensure that water management systems in Florida that protect and enhance agricultural production are not unduly disrupted.

While the Florida Everglades is the focus of these particular cases, the impact on other areas of Florida cannot be overstated. Florida is a relatively flat, high water table state. For decades before the Clean Water

Act, often at the insistence of or actually constructed by government, flood control structures have been used to manage water quantity for agriculture, flood protection and water supply.[3]

The South Florida Water Management District ("SFWMD") controls hundreds of pumps other than the S-2, S-3 and S-4 pumps in this case that would be affected by this ruling. Accordingly, resolution of the question of the applicability of the CWA to water transfers will impact the cost of producing crops throughout Florida, and nationally.

DACS actively participates in the adoption of Florida's laws and rules relating to the development and implementation of water quality standards, including nutrient standards and methods for their control. The DACS, through its Office of Agricultural Water Policy, works closely with the Florida Department of Environmental Protection ("FDEP") and other state, local, and federal agencies, as well as environmental and other public interest groups, to develop programs to address agricultural water quality issues.

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[3] Parker, Ferguson, Love, et al., Water Resources of Southeastern Florida, USGS Water Supply Paper 1255 (1955).

REASONS TO GRANT PETITION

The Supreme Court should resolve the regulation of water transfers and, based on the Clean Water Act's plain text, its policies, and its basis in cooperative federalism, adopt the EPA's current rule stating that transfers of waters for purposes of flood control, water supply and irrigation, are not subject to National Pollutant Discharge Elimination System ("NPDES") permitting as the correct interpretation of the Act.

PRELIMINARY STATEMENT

The Florida Department of Agriculture and Consumer Services herein supports the SFWMD in its acquiescence in Petitioners' Petition for a Writ of Certiorari. The Department takes this action because the uncertainty deriving from the apparent decision of EPA to revise its analysis of the applicability of the NPDES to water transfers threatens the ability of Agricultural interests in the state to plan their implementation of the Clean Water Act requirements. This applicability of the NPDES permitting requirements to water transfers has been repeatedly litigated. It appeared that the Eleventh Circuit had resolved the matter until EPA informed the Circuit Court that it intended to "revisit" the rule (40 C.F.R. § 122.3(i)) it adopted in 2008 and on which the Eleventh Circuit based its opinion.

ARGUMENT

I. Congress Did Not Intend that Transfers of Water Be Subject to NPDES Permitting.

Under the cooperative federalism structure of the Clean Water Act, the transfer of water from one water body to another has been traditionally reserved to the states.[4] As a consequence, such transfers for the purpose of flood control, water supply and irrigation have not been required to obtain NPDES permits. Most discharges that are subject to the NPDES permitting program exist to dispose of wastewater (treated or not). In those cases the pollutant content has resulted from the actions of the discharger.[5] In contrast, water transfers are designed to move water for the purpose of flood control or allocation of water supply. The transfer often may be reversed in direction when needed. The transferring party does

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[4] 33 U.S.C. § 1251(g).

[5] In *South Florida Water Management District v. Miccosukee Tribe of Indians, et al.*, 541 U.S. 95, 124 S.Ct. 1537 (2004), this Court rejected the proposition that NPDES permits are not required because the transfer of water does not add a pollutant from a point source. In its discussion the Court stated that under that interpretation, wastewater treatment plants would not be covered by the NPDES program. This conclusion ignores the fact that a wastewater treatment plant receives its influent from an isolated and dedicated waste stream. After treatment, the purpose of the discharge is to dispose of the treated water. Thus the treatment plant is "adding" a pollutant. This is very different from a transfer from one water body to another for the purpose of flood control, water supply or irrigation.

not cause or contribute any pollutant on either "side" of the transfer. Rather the transferring party is allocating water for one of the purposes mentioned above. The consequence of requiring the transferring party to obtain an NPDES permit would transfer the responsibility for treatment to a party that has no control over the quality of the water it transfers.

Historically, the Everglades system was a vast, interconnected hydrologic system. At that time, it could have been considered to be one water body.[6] Major human intervention in Everglades hydrology began in 1905. By 1927, the Everglades Drainage District, authorized by the Florida Legislature,[7] had excavated over 400 miles of canals. By 1929, droughts, floods and the deadly hurricanes of 1926 and 1928 had forced legislators to form the Okeechobee Flood Control District and to issue additional bonds to generate funding for the completion of drainage projects.[8] The drainage effort was successful in that water levels were greatly drawn down. In 1945, during a severe drought, the dry conditions led to soil subsidence and peat fires. This was followed in 1947 by 100 inches of rain that fell in the region, flooding 90% of South Florida. After enduring both the flooding and

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[6] Parker, Ferguson, Love, et al., Water Resources of Southeastern Florida, USGS Water Supply Paper 1255 (1955).

[7] Chapter 6456 Laws of Florida, Acts of 1913.

[8] F.T. Izuno, A Brief History of Water Management in the Everglades Agricultural Area, Univ. of Florida IFAS Extension Circular 815 (1989).

damage from droughts, Congress authorized the Central and South Florida Flood Control Project in 1948 to address the need to conserve water and provide flood protection.[9] All of these early projects authorized transfers of water based solely on need for flood control, water supply and irrigation. Part of the system included pumping of irrigation water from agricultural canals into Lake Okeechobee. This was the practice even before the construction of the Central and South Florida Flood Control Project.[10] The system of water conservation areas, levees, canals and pumps, has been revised a few times since then, but the basic structure remains. Today the SFWMD operates over 1000 miles of canals and hundreds of pumps to control water within its system. It is safe to say that in the construction of these projects, water quality was not considered.

Unfortunately, the problems of water quality in this massive engineered system were slow to be recognized. Not until 1973 did the state begin to investigate and address the problem of excess nutrients in Lake Okeechobee. Since then numerous studies have been made and programs implemented. These include two Lake Okeechobee Technical Advisory Committee Final Reports (1986 and 1990), which resulted in a number of actions. Reductions in phosphorus entering the lake from the north were addressed by requiring

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[9] PL 858, Title II, Flood Control Act of 1948.

[10] Parker, Ferguson, Love, et al., Water Resources of Southeastern Florida, USGS Water Supply Paper 1255 (1955).

permits for all animal feeding operations and by buying out a number of dairies. In addition, the state and federal governments began the restoration of the Kissimmee River to the north. Recent water quality improvements in the area have occurred as a result of the implementation of the Everglades Agricultural Area regulatory program (Florida Administrative Code Rule 40E-63) beginning in 1993.

A comprehensive Restudy of the Central and South Florida Flood Control Project was authorized in 1992[11] and completed in 1999. The Restudy recognized that there were multiple aspects to the Everglades system that needed to be addressed. The Restudy resulted in the Comprehensive Everglades Restoration Plan ("CERP") which received Congressional approval in 2000. That plan authorized numerous water quality projects which have been and are being implemented today.[12] The nature of these projects is primarily the construction of Stormwater Treatment Areas ("STAs") which receive and hold water flows to reduce the nutrient content prior to release of the water.

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[11] PL 102-580, § 309(l) (Water Resources Development Act of 1992).

[12] PL 106-541, § 601 (Water Resources Development act of 2000). Notably, the approved Plan is, among other things, "to ensure the protection of water quality." The projects authorized to address water quality are primarily stormwater treatment areas (STAs) designed to intercept flows and improve water quality. There is no mention of application of the NPDES program.

In the case of the Everglades system, the SFWMD, landowners, the State of Florida and the United States have all has expended considerable effort and commitment of resources over many years to address the problem of excess nutrients and other pollutants in the overall Everglades system. It is unquestioned that every further effort should be made to ensure that all parts of the Everglades meet water quality standards. Requiring an NPDES permit for water transfers, however, is the wrong solution to the problem. Requiring an NPDES permit for water transfers would not aid in the restoration effort, and could adversely affect the district's ability to move water to control floods, maintain the water supply and continue its restoration efforts.[13] There is no indication that Congress intended this result in its authorization of CERP. Although the Water Resources Development Act is aimed at authorizing specific water development projects, it nevertheless incorporates the Congressional intent for those projects and sets forth the methods for their implementation. In *Food and Drug Administration v. Brown & Williamson Tobacco Company,* 529 U.S. 120, 120 S.Ct. 1291 (2000), the court stated that "specific policy embodied in a later federal statute should control our construction of the

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[13] PL 106-541, §§ 601(h)(5)(A) and (B); (A) is a savings clause prohibiting elimination or transfer of legal sources of water, and (B) ensures maintenance of flood protection at (then) existing levels. Both of these indicate Congress' intent to ensure the maintenance of necessary water regimes as part of the CERP process.

[earlier] statute, even though it has not been expressly amended." In this case, Congressional adoption in 2000 of the methods for ensuring water quality under the CERP demonstrates Congress' intent that those methods were the means to be used to ensure water quality in the Everglades.

Congressional approval of the CERP should not be seen in isolation. The adoption of CERP without a requirement for NPDES permits for water transfers was not an oversight. With the years of study and restudy of the Everglades system, many options for water quality improvement were considered. The fact that NPDES permits were not part of the proposed solution clearly indicates that water transfers were not considered to be regulated under that provision of the Clean Water Act. Such a conclusion would apply to other water transfers wherever located. In this way, the Congressional approval of CERP indicates a basic policy interpretation applicable to water transfers generally.

II. EPA's Current Interpretation Concerning Water Transfers in its Rule Is the Appropriate Interpretation under the Text, Policy and Cooperative Federalism of the Clean Water Act.

In the case below, the Eleventh Circuit approved EPA's rule adopted in 2008,[14] finding that the transfer

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[14] 40 C.F.R. § 122.3(i).

of water from one navigable water to another, if no pollutants are added to the discharge, does not require an NPDES permit. This is generally referred to as the "unitary waters" approach to such discharges. In approving the EPA interpretation, the Court specifically relied on EPA's adoption of a rule governing such transfers in 2008, giving the EPA interpretation *Chevron* deference.[15] EPA was previously denied the ability to be heard on its unitary waters interpretation by this Court in *South Florida Water Management District v. Miccosukee Tribe of Indians, et al.*, 541 U.S. 95, 124 S.Ct. 1537 (2004), because the issue had not been determined in the lower courts and EPA had no "administrative document" supporting its position.

EPA engaged in a deliberative process over the ensuing year to develop a written analysis and interpretation that was signed in August 2005, entitled "Agency Interpretation on Applicability of Section 402[16] of the Clean Water Act to Water Transfers."[17] Subsequently EPA engaged in Notice and Comment Rulemaking to promulgate a rule incorporating the interpretation. The proposed rule was published on June 7, 2006 (71 FR 32889) and became final on June

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[15] *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778 (1984).

[16] 33 U.S.C. § 1342.

[17] The document specifically refers to the *Miccosukee* case as the impetus for engaging in the analysis.

13, 2008 (73 FR 33697).[18] In that determination, EPA delves into the long standing distinction, consistently followed in practice by EPA, between water quality, as the province of EPA implemented through the NPDES program, and water quantity, which was reserved to the states. Such a lengthy and deliberative public process does not fall into the category of a "litigation strategy" as asserted by Petitioners. Rather, when faced with the complex issue of statutory interpretation, EPA used the normal analytical and rulemaking process to make its determination.

Now, EPA has introduced uncertainty into these proceedings in its statement in its response to a Petition for Rehearing En Banc. Despite its well developed position and interpretation of the CWA provisions, EPA has indicated that it is "reconsidering" its interpretation.[19] But for this indication of a change in position, DACS would be content to proceed with implementation of the Eleventh Circuit decision. However, as the Eleventh Circuit decision was expressly decided based on giving *Chevron* deference to EPA's interpretation, EPA's statement leaves the future EPA interpretation in doubt. Apparently EPA believes that the *Chevron* doctrine allows it to substantially change its interpretation at any time and without a change in circumstances. While deference has been

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[18] 40 C.F.R. § 122.3(i).

[19] Reply of EPA to The Petition for Rehearing En Banc, p. 15.

given to agencies that change their positions,[20] such a major shift in such a short time would undercut the credibility of EPA's interpretation. EPA's stated intent leaves the future uncertain. Such uncertainty undermines the ability of agricultural interests and others nationwide to plan for the future. Specifically, if EPA does reverse its position in later rulemaking, it would lead to serious disruption in implementing the CERP, and perhaps the waste of monies already expended. The CERP involves the expenditure of billions of dollars by the parties in the restoration effort.[21] Its goal is to "restore, preserve, and protect the South Florida ecosystem while providing for other water related needs of the region, including water supply and flood protection. The Plan shall be implemented to ensure the protection of water quality. . . ."[22]

Furthermore, the Eleventh Circuit decision directly conflicts with *Catskill Mts. Chap. Trout Unlimited v. New York City*, 451 F.3d 77 (2d Cir. 2006), which adopted the opposite interpretation of the

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[20] *See, e.g., Food and Drug Administration v. Brown & Williamson Tobacco Company*, 529 U.S. 120, 157, 120 S.Ct. 1291, 1313 (2000), *citing, Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778 (1984).

[21] The initial WRDA legislation in 2000 authorized, among other things, ten specific projects with, at that time, a total projected cost of $1,100,918,000. PL 106-541, § 601(b)(2)(A)(i-x).

[22] PL 106-541, § 601(b)(1)(A).

Clean Water Act regarding the NPDES requirement. This conflict adds further uncertainty to the issue.

CONCLUSION

The EPA interpretation in its current rule is well founded and is the correct interpretation of the cooperative federalism at the base of the Clean Water Act. Under these circumstances DACS would have otherwise discouraged certiorari review. However, given the uncertainty concerning whether affected parties can rely on this interpretation going forward makes the resolution of this question important. DACS supports the South Florida Water Management District's acquiescence in Petitioner's Petition for Certiorari.

Respectfully Submitted,

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